

89-720
No.

Supreme Court, U.S.
FILED

NOV 2 1989

JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1989

AVDEL CORPORATION,

Petitioner,

vs.

RICARDO JALIL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN S. MAYER
GROTTA, GLASSMAN & HOFFMAN, P.A.
Attorneys for Petitioner
75 Livingston Avenue
Roseland, New Jersey 07068
(201) 992-4800

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QUESTION PRESENTED

Whether an arbitration award in which the arbitrator decides claims of national origin discrimination and retaliation, specifically presented by the grievant and which is confirmed by judgment in a state court proceeding is entitled to preclusive effect in a subsequent federal court action raising the same national origin discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964.

PARTIES

The parties hereto are the same parties as in the proceedings in United States District Court for the District of New Jersey, (Nos. 86-4878 and 87-4457), and on appeal to the United States Court of Appeals for the Third Circuit, (Nos. 87-5538 and 88-5182). Avdel Corporation is the petitioner herein and Ricardo Jalil the respondent, and will be referred to as "Avdel" and "Jalil" throughout this petition.

Pursuant to Supreme Court Rule 28.1, Avdel Corporation is wholly owned by Avdel, P.L.C., a company of the United Kingdom.

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No.

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AVDEL CORPORATION,

Petitioner,

vs.

RICARDO JALIL,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinions of the District Court for the District of New Jersey in cases 86-4878 and 87-4457 are unreported but are attached as Appendices F and H. The first opinion of the Court of Appeals for the Third Circuit dated February 1, 1989 is unreported and is attached as Appendix D. This opinion was vacated upon reconsideration pursuant to Order of the Court dated April 19,

1989. This Order is attached as Appendix C. The second opinion of the Court of Appeals is reported at 873 F.2d 701 (3d Cir. 1989) (Docket Nos. 87-5538 and 88-5182). It is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was made and entered on May 4, 1989. A petition for rehearing was filed on May 18, 1989. Rehearing was denied by Order of the Third Circuit dated August 7, 1989 (Appendix A). The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1738:

State and Territorial statutes and judicial proceedings; full faith and credit.

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings

or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Title VII of the Civil Rights Act of 1964; 42 U.S.C. § 2000e *et seq.* provides in relevant part:

§ 2000e-2 (a). It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-3:

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or

participated in any manner in an investigation, proceeding, or hearing under this subchapter.

N.J. Stat. Ann. 52A:24-10:

Force and effect of judgment

The judgment confirming, modifying or correcting an award or a judgment in any action under this chapter shall have the same effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in any other action and may be enforced as if rendered in any other action in the court in which it is entered.

STATEMENT OF THE CASE

Avdel, a manufacturer of metal fasteners, employed Jalil, of Chilean origin, from 1977 to 1985. Avdel terminated his employment on October 30, 1985, for engaging in unsafe conduct and gross insubordination. Thereafter, Jalil filed three lawsuits and numerous administrative claims.¹

The circumstances which led to this litigation began on October 28, 1985, when Jalil twice refused his foreman's direction to remove a radio headset while working on the plant floor. After a third directive, Jalil complied. On October 30, the supervisor again directed Jalil to remove the radio headset while working. Jalil refused to comply. The supervisor then returned to Jalil's

1. The National Labor Relations Board rejected Jalil's claim on appeal from an adverse finding of the NLRB's regional director. Similarly, the Board of Review of the New Jersey Division of Unemployment Compensation denied Jalil's appeal from a partial disqualification for unemployment benefits based on insubordination.

department with the plant manager. The plant manager directed Jalil to remove the headset and warned him that failure to do so would constitute insubordination. Jalil refused to remove the earphones, told the plant manager and supervisor to "get the hell out of here," turned his back on them and walked away (62a). As stated in Jalil's termination notice, he was discharged because he "willfully and knowingly engaged in unsafe conduct despite repeated warnings and because of [his] gross insubordination." (61a).

Pursuant to the collective bargaining agreement between Avdel and the United Electrical, Radio and Machine Workers of America, Local 417 ("the Union"), Jalil filed a grievance. Jalil specifically elected to present his Title VII discrimination claims in the arbitral forum. Respondent stated in the grievance submitted for arbitration:

Complainant was fired because he filed a discrimination charge with the New Jersey Division of Civil Rights (EEOC), on which copy was received by the Company (Avdel) on October 28, 1985. Complainant was discharged on October 30, 1985, under Company's false accusation of insubordination. Complainant have been retaliated against in violation of the Civil Rights Act of 1964, as amended for having filed a charge against the employer. [sic]

(75a).

At the arbitration hearing on his grievance, Jalil was represented by counsel who presented three witnesses (including Jalil), cross-examined company witnesses and submitted a post hearing brief. After hearing the testimony of six witnesses and considering post-hearing briefs, the Arbitrator issued his decision

in which he specifically rejected Jalil's retaliation claim. The Arbitrator found that Jalil failed to meet his burden of proof on this issue:

Finally, the Union argued that the termination is tied to charges made by the grievant with the EEOC. Herein nothing was offered to tie the charges made with the termination except the fact that the charges arrived at the Company on October 28. Nothing is on the record concerning the charge(s) except the date of their arrival at the Company.

(73a).

Jalil, represented by counsel, then sought to vacate this award in the Superior Court of New Jersey. Jalil argued, *inter alia*, that the arbitrator incorrectly decided his claims of retaliation and national origin discrimination. The New Jersey Court specifically held that the arbitrator addressed these issues and confirmed his award on this ground. The court stated:

It was the contention of the plaintiff that there was racial or ethnic discrimination being applied against him and also that certain pressures were being applied against him because he was a union representative. Plaintiff was president of Local 417. The arbitrator found that these grounds alleged by Mr. Jalil did not exist.

(62a).

* * *

All right. I have to add one thing to that finding.

I don't believe I stated that the arbitrator expressly found no evidence of discrimination either racial or ethnic or evidence they were (sic) selective enforcement because of union activities on the part of the employee plaintiff.

(63a).

Jalil, proceeding *pro se*, then filed two separate complaints against Avdel in the United States District Court for the District of New Jersey. In *Jalil v. Avdel Corp.*, No. 86-4878 (D.N.J., Filed Aug. 3, 1987), Jalil claimed, *inter alia*, that Avdel terminated his employment because of his national origin and in retaliation for filing a charge with the Equal Employment Opportunity Commission in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* On July 13, 1987, the Honorable Dickinson R. Debevoise granted Avdel's motion for summary judgment and dismissed the complaint.

Jalil then filed an identical complaint in a second action entitled *Jalil v. Avdel Corp.*, No. 87-4457 (D.N.J., Filed Mar. 1, 1988). The Honorable Harold A. Ackerman dismissed this suit by order entered March 3, 1988, as barred by the doctrine of *res judicata*.

Jalil, represented by court appointed counsel, appealed both decisions to the United States Court of Appeals for the Third Circuit. The Third Circuit issued an opinion on February 1, 1989, in which it affirmed the district court's grant of summary judgment on plaintiff's national origin claim, but reversed the award of summary judgment on the retaliatory discharge claim. After consideration of a petition for rehearing filed by Avdel, the court vacated its earlier opinion and issued a new opinion on May 4, 1989. The court reached the same result in its second opinion. *Jalil v. Avdel Corp.*, 873 F.2d 701 (3d Cir. 1989). The Court of

Appeals refused to grant preclusive effect to the arbitrator's award which had been specifically confirmed in state court on the issues of discrimination and retaliation.

SUMMARY OF ARGUMENT

Jalil elected to present his claims of national origin discrimination and retaliation under Title VII in the arbitral forum. Represented by counsel, he had a full and fair opportunity to present evidence and cross examine witnesses before the arbitrator. The arbitrator specifically addressed and rejected Jalil's discrimination and retaliation claims. Jalil then elected to present those issues to the Superior Court of New Jersey in an effort to overturn the arbitration award. The court specifically rejected Jalil's claim when it confirmed the award.

The full faith and credit statute, 28 U.S.C. § 1738, requires federal courts to give the same "full faith and credit" to the judicial proceedings of any state court that they would receive in the state from which they arise. The United States Court of Appeals for the Third Circuit failed to apply this statutory mandate when it reversed the district court's grant of summary judgment with respect to Jalil's retaliation claim.

In failing to give full faith and credit to the decision of the Superior Court of New Jersey, the Third Circuit reached a result contrary to that of the United States Court of Appeals for the Ninth Circuit in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, ____ U.S. ___, 58 U.S.L.W. 3213 (1989). Accordingly, the petition should be granted to resolve a conflict in the Circuits regarding an important jurisprudential issue: the effect in federal court of a state court decision confirming an arbitration award. This issue also has an important impact on labor and employment law.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN FAILING TO GIVE PRECLUSIVE EFFECT TO THE NEW JERSEY STATE COURT JUDGMENT UPHOLDING JALIL'S DISCHARGE.

The full faith and credit statute, 28 U.S.C. § 1738, provides in relevant part:

The records and judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken.

It is well established that this statute requires federal courts to give state court decisions the same "full faith and credit" as they would receive in the state from which they arose. "[Section 1738] embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." *Migra v. Warren City School District Bd. of Educ.*, 465 U.S. 75, 84 (1984). See also *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . ."). The Court also requires federal courts to give an administrative adjudication reviewed by a state court the same "full faith and credit" the adjudication would enjoy in the state's own court. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 (1982).

Although the Court denies preclusive effect to an unconfirmed arbitration award, see, e.g., *Alexander v. Gardner Denver Co.*, 415 U.S. 36 (1974), it has not addressed the preclusive effect of an arbitration award which has been confirmed by a state court.

"The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us . . . and we do not decide it." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 223 (1985). See also *McDonald v. City of West Branch*, 466 U.S. 284, 285 (1984).

Here, the state court confirmed the arbitration award. In doing so, the state court specifically upheld the arbitrator's finding that Avdel did not terminate Jalil's employment because of his national origin or in retaliation for his having filed a charge of discrimination. Section 1738 requires federal courts to give preclusive effect to such a state court decision.

The United States Court of Appeals for the Ninth Circuit, in accord with Section 1738, granted preclusive effect to a state court decision confirming an arbitration award in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), cert. denied, ____ U.S. ___, 58 U.S.L.W. 3213 (1989). In that case, plaintiff unsuccessfully challenged his discharge in administrative proceedings and in arbitration. After the grievant lost in arbitration, the decision was confirmed in state court. The employee then filed suit in federal district court. That court granted preclusive effect to the state court decision and granted summary judgment.

In light of this history, the Ninth Circuit affirmed and commented, "how many games must a defendant win before the match is finally over." The court answered that question as follows:

[T]he plain language of section 1738 controls, requiring us to give the state court's determination preclusive effect. The state court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of section 1738, and thus

must be given the full faith and credit it would receive under state law.

Caldeira, 866 F.2d at 1178.

In this case, the Third Circuit reached a contrary result. It erroneously failed to grant preclusive effect to the state court judgment because the state court had a "limited role" in reviewing the arbitration award. In fact, the state court specifically reviewed and upheld the arbitrator's finding that Avdel did not terminate Jalil's employment because of his national origin or in retaliation for his filing a charge.

Further, in emphasizing the "limited role" of the state court, the Third Circuit ignored the holdings of this Court. This Court has held:

It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect . . . there is no requirement that judicial review must proceed de novo if it is to be preclusive.

Kremer, 456 U.S. at 480 n.21 (citations omitted). As the Eleventh Circuit has recognized, "The teaching of *Kremer* . . . is that federal courts must accord preclusive effect to issues litigated and decided on the merits, even though the review on the merits is sharply limited." *Sykes v. McDowell*, 786 F.2d 1098, 1103 (11th Cir. 1986).

Here, Jalil had a full and fair opportunity to present his claims to the arbitrator. Counsel for Jalil presented witnesses and documents, cross-examined Company witnesses and submitted a post hearing brief. On appeal to state court, Jalil, represented by counsel, submitted briefs and challenged the decision on numerous grounds, including the arbitrator's alleged failure to

properly decide his discrimination and retaliation claims.

Finally, the Third Circuit ignores New Jersey law which requires that a decision confirming an arbitration award receive preclusive effect. N.J.S.A. 2A:24-10 states:

Force and Effect of Judgment

The judgment confirming, modifying or correcting an award or a judgment in any action under this chapter shall have the same effect, in all respects, as, and is subject to all the provisions of law relating to, a judgment in any other action and may be enforced as if rendered in any other action in the court in which it is entered.

Thus, the New Jersey Legislature has specifically directed that the decisions of a New Jersey court upon review of an arbitration award shall have preclusive effect. Such a statutory command requires a federal court to give preclusive effect to a confirmed arbitration award. *Caldeira*, 886 F.2d at 1179.

In accord with this and similar statutory mandates, New Jersey courts have recognized that judicially confirmed arbitrations or administrative decisions should receive preclusive effect. See *Thornton v. Potamkin Chevrolet*, 94 N.J. 1, 8 n.2, 462 A.2d 133, 137 n.2 (1983). Furthermore, "[i]t is no objection that the administrative decision was subjected only to a lenient standard of review." *Zoneraich v. Overlook Hospital*, 212 N.J. Super. 83, 94, 514 A.2d 53, 58 (App. Div.), certif. denied, 107 N.J. 32, 526 A.2d 126 (1986).

Here, Jalil elected to present his discrimination and retaliation claims to the arbitrator and to appeal the arbitrator's finding to the state court. The grievance presented by Jalil and denied by

the arbitrator states:

Complainant was fired because he filed a discrimination charge with the New Jersey Division of Civil Rights (EEOC), on which copy was received by the Company (Avdel) on October 28, 1985. Complainant was discharged on October 30, 1985, under Company's false accusation of insubordination. Complainant have been retaliated against in violation of the Civil Rights Act of 1964, as amended for having filed a charge against the employer. [sic]

(75a).

Where, as here, a party elects to resolve matters through arbitration, the courts should give effect to that decision. *See Perry v. Thomas*, 482 U.S. 483 (1987) (agreement to arbitrate held applicable to dispute over commissions otherwise governed by California statute providing a state court forum); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987) (arbitration of securities fraud and RICO claims compelled by agreement to arbitrate). Arbitration provides a prompt, comparatively inexpensive forum for the resolution of employment disputes. *See J. Dertouzos, E. Holland, P. Ebener, The Legal and Economic Consequences of Wrongful Termination*, Rand Institute for Civil Justice (1988).

No injustice arises from barring yet another round of litigation by giving effect to the state court's confirmation of the arbitration award. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources and fosters reliance on judicial action by minimizing the possibility of inconsistent

decisions.'" *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

CONCLUSION

Based upon all the foregoing, petitioner respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

STEPHEN S. MAYER
GROTTA, GLASSMAN &
HOFFMAN, P.A.
Attorneys for Petitioner

DAVID R. MILLER

On the Petition

Dated: November 1, 1989

**APPENDIX A — ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT DENYING
PETITION FOR REHEARING FILED AUGUST 7, 1989**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 87-5538 and 88-5182

RICARDO JALIL,

Appellant

v.

AVDEL CORPORATION

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM,
SLOVITER, BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN
NYGAARD, and ROSENN,* *Circuit Judges*

The petition for rehearing filed by Appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

* Senior Judge Rosenn as to panel rehearing only.

2a

Appendix A

By the Court,

s/ John J. Gibbons
Chief Judge

DATED: August 7, 1989

**APPENDIX B — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT IN JALIL
v. AVDEL CORP., CIVIL NOS. 87-5538 AND 88-5182 FILED
MAY 4, 1989**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

NOS. 87-5538 and 88-5182

RICARDO JALIL.

Appellant

v.

AVDEL CORPORATION

**Appeal from the United States District Court
for the District of New Jersey - Newark
Civil Nos. 86-4878 and 87-4457**

**Argued December 13, 1988
Resubmitted Sur Petition for Rehearing April 19, 1989
Before: GIBBONS, *Chief Judge*,
HUTCHINSON, and ROSENN,
*Circuit Judges***

Opinion Filed May 4, 1989

**DOUGLAS S. EAKELEY, ESQ.
DAVID W. GARLAND, ESQ. (Argued)
Riker, Danzig, Scherer, Hyland
& Perretti
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07960-1981
Attorneys for Appellant**

Appendix B

STEPHEN S. MOYER, ESQ. (Argued)
JED L. MARCUS, ESQ.
DAVID R. MILLER ESQ.
Grotta, Glassman & Hoffman, P.A.
75 Livingston Avenue
Roseland, NJ 07068
Attorneys for Appellee

OPINION OF THE COURT¹

ROSENN, Circuit Judge.

The appellant instituted these proceedings charging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., because of national origin discrimination during his employment and retaliatory discharge. The district court granted summary judgment for the defendant, holding that plaintiff failed to present a *prima facie* case. In a second action, the court dismissed the plaintiff's case on the basis of *res judicata* and enjoined him from bringing any more employment related claims. The primary issues raised on appeal by the plaintiff are whether the record established sufficient evidence for a *prima facie* case of retaliatory discharge and whether the evidence sufficiently raised a question of material fact pertaining to the alleged pretextual reason for the employer's action. We reverse and remand for trial.

1. After reconsideration of a petition for panel rehearing filed by Avdel Corporation, Appellee, the opinion of the court entered February 1, 1989, and the judgment thereon were vacated by order filed April 19, 1989, and the matter was listed for submission before the panel.

Appendix B

I.

Avdel Corporation (Avdel), a manufacturer of metal fasteners, employed the plaintiff, Ricardo Jalil, of Chilean origin, from 1977 to 1985. During that period, Jalil progressed from lower-skill positions to the "lead man" position he occupied at the time of his discharge. At the same time, plaintiff also became active in union affairs. He was elected shop steward in 1979, reelected in 1980, and became president of his Local in 1984. He held that position when the company terminated him.

Some months before Jalil's discharge, he filed a grievance claiming that Avdel was discriminating against him because of his union activity. Six days later, on September 19, 1985, the company informed Jalil that his employment had been terminated for failure to report his absence by the third day. After the union interceded on his behalf, Avdel reduced Jalil's discharge to a three-day suspension, with the admonishment that the next infraction would result in termination.

On September 26, 1985, Jalil filed another grievance, in which he complained of harassment and discrimination on the basis of national origin and union activity. The union again supported his claims, although Avdel denied them, and the grievance remained unsettled.

On October 17, 1985, Jalil filed a charge of discrimination with the New Jersey Division of Civil Rights (DCR) and the Equal Employment Opportunity Commission (EEOC), alleging that Avdel had denied him access to his personnel file and had suspended him in retaliation for filing a grievance with his union and because of his national origin. Avdel received a copy of the charge of discrimination on October 28, 1985. Simultaneously, the events precipitating Jalil's discharge began and rapidly ran their course.

Appendix B

On the day Avdel received a copy of the discrimination charge, the department foreman approached Jalil at his work station and asked him to remove the radio headset that he was wearing. After protesting, Jalil complied. Two days later the foreman again requested Jalil to remove his radio headset. Jalil refused, and the foreman sought assistance from the plant manager and plant foreman. Again Jalil refused the request, arguing that the plant safety rules did not prohibit the radio's use. After telling the foremen and the manager to get out of his department, however, Jalil acceded to their requests and removed the radio. Nevertheless, later that day Avdel fired Jalil for "gross insubordination."

After his termination, on October 31, 1985, Jalil filed a second charge of discrimination with the DCR and the EEOC, claiming that Avdel fired him in retaliation for filing the earlier charge of discrimination.² Finally, on December 8, 1986, Jalil filed pro se his first suit in the United States District Court for the District of New Jersey, alleging, among other things, that Avdel terminated his employment because of his national origin and in retaliation for filing his charge with the EEOC.

On July 13, 1987, the district court granted summary judgment in favor of the defendant Avdel on the ground that Jalil had failed to establish a prima facie case of either national origin discrimination or retaliatory discharge. Following his unsuccessful

2. Jalil pursued several other avenues of relief as well, but succeeded in none. The New Jersey Division of Unemployment denied his claim for unemployment compensation. Likewise, his grievance filed pursuant to the governing collective bargaining agreement was rejected by the appointed arbitrator. The New Jersey Superior Court upheld the arbitrator's decision on appeal. Finally, the National Labor Relations Board rejected Jalil's complaint on the basis of the arbitrator's adverse decision.

Appendix B

motion to vacate the summary judgment order, and while his appeal of the order was pending in this court, Jalil brought a second Title VII action in district court. In March 1988, however, the district court granted defendant's motion for summary judgment in the second action, holding the claim barred by *res judicata*. The district court also granted Avdel's counterclaim for an injunction prohibiting Jalil from bringing further employment-related lawsuits unless he secures the permission of the court. Jalil appealed this decision as well. Because we reverse the first grant of summary judgment and remand for trial, the second district court judgment and the injunction effectively will be vacated.³

II.

As a preliminary matter, and although the defendant did not raise the issue in the trial court or in its brief to this court but did so in its petition for rehearing, we will address whether the full faith and credit statute, 28 U.S.C. § 1738,⁴ would require dismissal of Jalil's Title VII claims on the basis of issue preclusion. Defendant argues that the New Jersey superior court's affirmation of the arbitrator's decision against Jalil, *see supra* note 2, precludes further litigation of any subsequent Title VII claims in federal court.

3. Our jurisdiction is conferred by 28 U.S.C. § 1291 (1982).

4. Section 1738 provides in pertinent part:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have be law or usage in the courts of such State, Territory or Possession from which they are taken.

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Before instituting this action in federal court, Jalil, through his union, filed grievances against Avdel challenging his discharge, alleging it was not for cause. The grievances ultimately proceeded to arbitration, and the arbitrator found in favor of the employer, Avdel. The arbitrator found that Jalil had been insubordinate in refusing to remove his radio headset, and, the arbitrator concluded, "since insubordination had been found the Arbitrator has no alternative but to sustain the termination." The arbitrator thus rejected plaintiff's claim that he was discharged because of his union activity. Moreover, the arbitrator summarily rejected as unsupported by the evidence plaintiff's claim that his discharge was in retaliation for his filing a complaint with the EEOC. The arbitrator concluded that Jalil's discharge only two days after Avdel received notice of the EEOC claim was not enough to tie the discharge to the protected activity.

Plaintiff sought review of the arbitrator's decision in New Jersey superior court. By statute, a New Jersey court may vacate an arbitrator's decision only if it was procured by undue means or if the powers of the arbitrator were exceeded. N.J. Stat. Ann. § 2A:24-8 (West 1987). The court concluded that the arbitrator acted within his powers in finding that insubordination was grounds for automatic termination under the collective bargaining agreement. It also found no evidence of undue means. Therefore, the court confirmed the arbitration decision in favor of Avdel.

The defendant argues that under the full faith and credit statute, 28 U.S.C. § 1738, the state court's affirmance of the arbitrator's decision precludes further litigation of Jalil's Title VII claims. Defendant correctly observes that the Supreme Court has held that Title VII did not abrogate section 1738. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

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the Court held that a state court review of an agency decision must be given the same preclusive effect by a federal court as it would be given by another state court, provided that the state proceedings met minimum due process requirements.

The Supreme Court has not directly addressed the issue of whether an arbitrator's decision (as distinguished from an agency decision) that has been reviewed by the state court is entitled to preclusive effect. In *Rider v. Commonwealth of Pennsylvania*, 850 F.2d 982 (3d Cir.), cert. denied, 109 S. Ct. 556 (1988), however, this court answered that question and held that a state court review of an arbitrator's decision may also be entitled to preclusive effect under section 1738 in subsequent Title VII actions. Because the case at hand involves a state court review of an arbitrator's decision, *Rider* compels us to apply section 1738 and follow its directive of assessing the preclusive effect the state court's decision would be given by another court in the state.

New Jersey courts follow the rule of issue preclusion as described in the Restatement of Judgments. See *Collucci v. Thomas Nicol Asphalt Co.*, 194 N.J. Super. 510, 515, 477 A.2d 403, 406 (1984). The Restatement explains:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 at 250 (1982). Before issue preclusion applies in an action, however, New Jersey law, not atypically, requires that the issue presented in the later action be identical to the issue decided in the earlier adjudication. See, e.g.,

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Morristown Trust Co. v. Thebaud, 43 N.J. Super. 209, 217, 128 A.2d 288, 293 (1957). Thus a New Jersey court would give preclusive effect to the state court's affirmation of the arbitrator's decision only if the issues adjudicated by that reviewing court were identical to the Title VII issues.

A review of the New Jersey court's opinion confirming the arbitrator's decision reveals that the issues there are not identical to the issues in Jalil's Title VII action in federal court. The state court confined its analysis to the statutory grounds for vacating an arbitrator's decision. In describing its limited role under the statute, it stated:

We are not second judges of what the arbitrator did. . . . We are not here to say that given the same set of facts, we would come to different conclusions or given the same testimony we would find different facts.

The court applied the very narrow standard of review that allows only for assessing whether the arbitrator exceeded his authority or whether his decision was obtained by undue means. Although citing the arbitrator's conclusions on the subject, the court itself did not itself address the Title VII issues raised by the plaintiff. Thus, for example, the state court itself made no finding as to the correctness of the arbitrator's rejection of plaintiff's discrimination and retaliation claims. Nor did the state court address the Title VII issue of whether the defendant's proffered reason for firing Jalil, namely, insubordination, was merely a pretext for a discriminatory or retaliatory discharge. Because the issues in the two actions differ, the state court's affirmation of the arbitrator's decision cannot have preclusive effect in the Title VII action before us.

It is this difference in issues that distinguishes this case from *Rider*, in which we held that an earlier

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state court affirmation of an arbitrator's decision precluded a federal discrimination action. 850 F.2d at 995. In *Rider*, the state court reversed an arbitrator's decision that female gender was not a bona fide occupational qualification (BFOQ) for prison guard positions supervising female inmates because the arbitrator exceeded his authority in arriving at that conclusion. The arbitrator, the state court concluded, should not have looked to employment discrimination case law that balanced the rights of inmates against the rights of guards, but rather should only have interpreted the relevant collective bargaining agreement. *Id.* at 987. The state court then undertook its own analysis of the collective bargaining agreement, concluding that female gender was a rationale requirement under the contract and implicitly holding that female gender was a BFOQ for the positions at issue. The state court therefore reversed the arbitrator's decision and found in favor of the defendant.

When the *Rider* plaintiffs brought a Title VII action in federal court, the district court dismissed on the ground of issue preclusion. On appeal, the plaintiffs argued that the state court's decision should not have preclusive effect because the standard of review of an arbitrator's decision was so narrow as to make the issue presented there different from the issue presented in the Title VII action. *Id.* at 990-91. We rejected that argument because, we held, the state court reviewing the arbitrator's decision necessarily addressed the BFOQ question, which was dispositive of the Title VII claim. We wrote:

The flaw in the male guard's argument is that it fails to take into account the manner in which both the arbitrator and the Commonwealth Court grafted classic Title VII BFOQ analysis onto their respective interpretations of the agreement. . . .

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On appeal, the Commonwealth Court . . . held that female gender was indeed a BFOQ for the jobs at issue in this case. Thus, it is beyond dispute that the issue throughout both proceedings prior to the institution of the instant federal suit was whether female gender was a BFOQ for the positions being advertised

Id. at 991. Because the merits of the Title VII claim "critically hinged" on the BFOQ issue, *id.*, dismissal was appropriate.

In Jalil's case, the arbitrator made passing reference to plaintiff's Title VII claims, although from our reading it appears to us that he did not adequately consider the retaliatory discharge claim or the question whether a firing may be discriminatory notwithstanding the employee's insubordination.⁵ In contrast to *Rider*, however, the state court here gave no consideration to plaintiff's Title VII rights, explicitly refusing to stand as "second guessers of what the arbitrator did." Thus, here, unlike *Rider*, the state court reviewing the arbitrator's decision did not address the same issues raised in Jalil's Title VII action. Cf. *Kremer*, 456 U.S. at 480 n.21 (construing the state court's affirmance of plaintiff's discharge as a decision that the claim lacked merit as a matter of law). Issue preclusion therefore poses no bar to plaintiff's action here. We next consider whether summary judgment for Avdel was nevertheless appropriate.

5. Although the arbitrator gave some consideration to Jalil's Title VII claims, his decision is not entitled to preclusive effect in federal court. By contrast, a state court decision is entitled to such effect under section 1738. *Kremer*, 456 U.S. at 476. The Supreme Court has held that an arbitral decision, although it may be accorded great weight if it gives full consideration to an employee's Title VII rights, cannot in itself be dispositive of a Title VII claim in federal court. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974).

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III.

In reviewing a grant of summary judgment, we apply the same test the district court should have employed initially. *Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3d Cir. 1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of demonstrating the absence of material fact issues regardless of which party would have the burden of persuasion at trial. If the nonmoving party has the burden of persuasion at trial, "the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986)), cert. dismissed, 108 S. Ct. 26 (1987).

The burden of proof in Title VII cases is governed by the framework erected in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and iterated by its progeny. *Jackson v. University of Pittsburgh*, 826 F.2d 230, 232 (3d Cir. 1987), cert. denied, 108 S. Ct. 732 (1988). Plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to rebut the proof of discrimination by articulating some legitimate, nondiscriminatory reason for the employee's discharge. The ultimate burden of persuasion, which remains always with the

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plaintiff, may then be met by proving by a preponderance of the evidence that the alleged reasons proffered by the defendant were pretextual and that the defendant intentionally discriminated against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Hankins*, 829 F.2d at 440. The plaintiff may satisfy the ultimate burden of proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-805). Circumstantial evidence may suffice to challenge the defendant's alleged reasons as pretextual. *Chipollini*, 814 F.2d at 895.

Because the plaintiff bears the burden of persuasion in Title VII actions, a defendant is entitled to summary judgment if it can demonstrate that the plaintiff could not carry the burden of proof at trial. The defendant may demonstrate this in two ways: it may show that the plaintiff is unable to establish a prima facie case of discrimination; or, if the plaintiff has successfully established a prima facie case, the defendant may win summary judgment by showing that the plaintiff could not produce sufficient evidence of pretext to rebut an assertion of nondiscriminatory reasons for the discharge.

Summary judgment is inappropriate, however, if the plaintiff establishes a prima facie case and counters the defendant's proffered explanation with evidence raising a factual issue regarding the employer's true motivation for discharge. When the defendant's intent has been called into question, the matter is within the sole province of the factfinder. As we have pointed out before, because

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intent is a substantive element of the cause of action--generally to be inferred from the facts and conduct of the parties--the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility.

Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981) (citing *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 121 (3d Cir. 1966)).

The district court here held that Jalil failed to establish a *prima facie* case of discrimination and retaliatory discharge because, it concluded, qualification for the job was an essential element of both claims, and Jalil's unquestionable insubordination made him unqualified. We reject the district court's analysis. Insubordination, under the *McDonnell Douglas* method of proof, plainly is not something the plaintiff must disprove to succeed at the first level of proof, but rather it is more logically a defense that is raised at the second level to meet the plaintiff's *prima facie* case of discrimination. See *Pollock v. American Tele. & Tel. Long Lines*, 794 F.2d 860, 863-64 (3d Cir. 1986) (insubordination, poor performance, and misconduct asserted as legitimate reasons for employee discharge); *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984) (insubordination may serve as a legitimate, nondiscriminatory reason for discharge); *Nulf v. Int'l Paper Co.*, 656 F.2d 553, 559 (10th Cir. 1981) (insubordination held true reason for employee discharge); *Goodwin v. City of Pittsburgh*, 480 F. Supp. 627, 634 (W.D. Pa. 1979) (finding insubordination rationale to be pretextual and holding for plaintiff), *aff'd without opinion*, 624 F.2d 1090 (3d Cir. 1980); cf. *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985) (inability to get along

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with supervisor is legitimate reason for discharge}, *cert. denied*, 475 U.S. 1035 (1986).

To the extent employee qualification is an element of a Title VII action, we hold that plaintiff established it. Avdel employed Jalil for eight years and promoted him during that period to the "lead man" position in his department. Thus, his satisfactory performance of duties over a long period of time leading to a promotion clearly established his qualifications for the job. Cf. *Bellissimo*, 764 F.2d at 180 (plaintiff was qualified for the job although she could not prove that the poor performance reasons given for her discharge were pretextual); *Brown*, 746 F.2d at 1411 (plaintiff was qualified for the job and established a prima facie case of discrimination even though defendant established that she had been insubordinate).

IV.

Having disposed of the "qualification" issue, we turn now to examine seriatim Jalil's two claims of discrimination. To establish a prima facie case of national origin discrimination, plaintiff must show that (1) he was a member of a protected class; (2) he was qualified for the job; and (3) he was discharged while other employees not in his protected class were retained. Cf. *Jackson v. University of Pittsburgh*, 826 F.2d at 233 (race discrimination); *Chipollini*, 814 F.2d at 897 (age discrimination); *Bellissimo*, 764 F.2d at 179 (sex discrimination). There is no dispute that plaintiff, Chilean in origin, is a member of a protected class. Further, as we noted above, Jalil qualified for the job. A review of the record leads us to conclude, however, that Jalil was unable to satisfy the third element of his prima facie case.

Jalil attempts to prove this aspect of his case with evidence that he previously submitted a grievance

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charging national origin discrimination, that two other employees were cited for insubordination but were not discharged, and that other employees wore radio headsets and were not disciplined. On review of the record, however, plaintiff's evidence lacks the necessary mortar with which to build a case of national origin discrimination. Jalil's earlier grievances are insufficient to support a Title VII claim, as they represent nothing more than mere allegations of discrimination. Cf. *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.) (conclusory allegations of discrimination, absent particulars, insufficient to defeat summary judgment motion in Title VII case), cert. denied, 474 U.S. 899 (1985). The evidence that two other employees were not discharged despite their insubordination is likewise inadequate without some evidence of relevancy. Besides not demonstrating that the employees were similarly situated, plaintiff failed to show that the two employees were not members of the protected class.

Finally, the evidence regarding other employees wearing headsets is not persuasive. That evidence consisted of the plant manager's testimony at Jalil's unemployment compensation hearing that three years earlier an employee had been ordered to remove his headset radio and had complied, and Jalil's vague testimony at that hearing that other people wore radio headsets. Again, the evidence is simply too general, does not address the plaintiff's claim of national origin discrimination, and fails to make out a prima facie case.

Jalil's claim of retaliatory discharge, however, has some real substance. The controlling standards are quite plain. To establish a prima facie case, plaintiff must show (1) that he engaged in a protected activity; (2) that he was discharged subsequent to or

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contemporaneously with such activity; and (3) that a causal link exists between the protected activity and the discharge. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1987), cert. denied sub nom. *Jordan v. Hodel*, 1989 U.S. LEXIS 170; *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73 (3d Cir. 1986).

We believe plaintiff succeeded in establishing all three elements. Jalil unquestionably engaged in a protected activity when he filed discrimination claims with the DCR and the EEOC. And, obviously, Jalil was discharged. He demonstrated the causal link between the two by the circumstance that the discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim. See *Burrus v. United Tele. Co.*, 683 F.2d 339, 343 (10th Cir.) ("The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."), cert. denied, 459 U.S. 1071 (1982). Accordingly, Jalil established a prima facie case of retaliatory discharge.

At this point, the burden shifted to defendant to advance a legitimate, nondiscriminatory reason for discharging Jalil. Avdel easily met this burden by introducing evidence that plaintiff was fired for his insubordination in twice refusing to immediately remove his headset radio when so directed. To obtain summary judgment, then, Avdel needed to show that plaintiff could not raise an issue of fact regarding whether defendant's proffered explanation was pretextual. *Pollock*, 794 F.2d at 865.

An objective review of the record convinces us, however, that Jalil introduced sufficient evidence to call into question Avdel's true motivation in discharging him and, accordingly, to defeat Avdel's motion for summary judgment. The timing of the discharge in relation to Jalil's EEOC complaint may

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suggest discriminatory motives on the part of Avdel.⁶ Moreover, the absence of a written rule against radio headsets and the presence of a dispute whether there was an unwritten rule could permit the inference, in light of the timing of the discharge, that Avdel was harassing Jalil, trying to induce his insubordination to have a pretext for firing him. *see Brown*, 746 F.2d at 1411; *Nulf*, 656 F.2d at 559, or it could suggest the very real possibility that Avdel "seized upon this instance of insubordination to fire" Jalil. *See Leonard v. City of Frankfurt Elec. & Water Plant*, 752 F.2d 189, 195 (6th Cir. 1985). In any event, the evidence created a factual issue regarding motivation that properly belongs to the factfinder.

V.

We hold that the district court properly granted summary judgment for defendant on plaintiff's national origin discrimination claim, but erred in granting Avdel summary judgment on the retaliatory discharge claim. Plaintiff established a prima facie case of retaliatory discharge, and countered defendant's explanation for Jalil's termination with sufficient evidence to raise a genuine issue of fact as to defendant's true motivation for firing him. The matter was therefore within the sole province of the finder of fact and could not be resolved on summary judgment.

6. Although this fact is important in establishing plaintiff's prima facie case, there is nothing preventing it from also being used to rebut defendant's proffered explanation. As we have observed before, the *McDonnell Douglas* formula

does not compartmentalize the evidence so as to limit its use to only one phase of the case. The plaintiff's evidence might serve both to establish a prima facie case and discredit a defendant's explanation.

Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984).

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Accordingly, we will reverse the grant of summary judgment on the retaliatory discharge claim and remand the case for further proceedings consistent with this opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

**APPENDIX C — ORDER OF THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT VACATING
JUDGMENT AND SUBMITTING FOR PANEL
RECONSIDERATION FILED APRIL 19, 1989**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Nos. 87-5538 and 88-5182

RICARDO JALIL,

Appellant

v.

AVDEL CORPORATION

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HUTCHINSON and ROSENN,
Circuit Judges

After reconsideration of the petition for panel hearing, it is

ORDERED that the opinion of this court entered February 1, 1989 and the judgment entered thereon are vacated, the mandate recalled, and the petition for in banc consideration suspended. The matter will be listed for submission before the panel.

By the Court,

s/ John J. Gibbons
Chief Judge

DATED: April 19, 1989

**APPENDIX D — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT IN JALIL
v. AVDEL CORP., CIVIL NOS. 87-5538 AND 88-5182 FILED
FEBRUARY 1, 1989**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5538 and 88-5182

RICARDO JALIL.

Appellant

v.

AVDEL CORPORATION

Appeal from the United States District
Court for the District
of New Jersey - Newark
Civil Nos. 86-4878 and 87-4457

Argued December 13, 1988
Before: GIBBONS, Chief Judge.
HUTCHINSON, and ROSENN,
Circuit Judges
Opinion Filed February 1, 1989

DOUGLAS S. EAKELEY, ESQ.
DAVID W. GARLAND, ESQ. (Argued)
Riker, Danzig, Scherer, Hyland
& Perretti
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07960-1981
Attorneys for Appellant

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STEPHEN S. MOYER, ESQ. (Argued)
JED L. MARCUS, ESQ.
DAVID R. MILLER ESQ.
Grotta, Glassman & Hoffman, P.A.
75 Livingston Avenue
Roseland, NJ 07068
Attorneys for Appellee

OPINION OF THE COURT

ROSENN, Circuit Judge.

The appellant instituted these proceedings charging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq., because of national origin discrimination during his employment and retaliatory discharge. The district court granted summary judgment for the defendant, holding that plaintiff failed to present a *prima facie* case. In a second action, the court dismissed the plaintiff's case on the basis of *res judicata* and enjoined him from bringing any more employment related claims. The primary issues raised on appeal by the plaintiff are whether the record established sufficient evidence for a *prima facie* case of retaliatory discharge and whether the evidence sufficiently raised a question of material fact pertaining to the alleged pretextual reason for the employer's action. We reverse and remand for trial.

I.

Avdel Corporation (Avdel or the company), a manufacturer of metal fasteners, employed the plaintiff, Ricardo Jalil, of Chilean origin, from 1977 to 1985. During that period, Jalil progressed from lower-skill positions to the "lead man" position he occupied at the time of his discharge. At the same time,

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plaintiff also became active in union affairs. He was elected shop steward in 1979, reelected in 1980, and became president of his Local in 1984. He held that position when the company terminated him.

Some months before Jalil's discharge, he filed a grievance claiming that Avdel was discriminating against him because of his union activity. Six days later, on September 19, 1985, the company informed Jalil that his employment had been terminated for failure to report his absence by the third day. After the union interceded on his behalf, Avdel reduced Jalil's discharge to a three-day suspension, with the admonishment that the next infraction would result in termination.

On September 26, 1985, Jalil filed another grievance, in which he complained of harassment and discrimination on the basis of national origin and union activity. The union again supported his claims, although Avdel denied them, and the grievance remained unsettled.

On October 17, 1985, Jalil filed a charge of discrimination with the New Jersey Division of Civil Rights (DCR) and the Equal Employment Opportunity Commission (EEOC), alleging that Avdel had denied him access to his personnel file and had suspended him in retaliation for filing a grievance with his union and because of his national origin. Avdel received a copy of the charge of discrimination on October 28, 1985. Simultaneously, the events precipitating Jalil's discharge began and rapidly ran their course.

On the day Avdel received a copy of the discrimination charge, the department foreman approached Jalil at his work station and asked him to remove the radio headset that he was wearing. After protesting, Jalil complied. Two days later the foreman again requested Jalil to remove his radio headset. Jalil refused, and the foreman sought assistance from the

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plant manager and plant foreman. Again Jalil refused the request, arguing that the plant safety rules did not prohibit the radio's use. After telling the foremen and the manager to get out of his department, however, Jalil acceded to their requests and removed the radio. Nevertheless, later that day Avdel fired Jalil for "gross insubordination."

After his termination, on October 31, 1985, Jalil filed a second charge of discrimination with the DCR and the EEOC, claiming that Avdel fired him in retaliation for filing the earlier charge of discrimination.¹ Finally, on December 8, 1987, Jalil filed pro se his first suit in the United States District Court for the District of New Jersey, alleging, among other things, that Avdel terminated his employment because of his national origin and in retaliation for filing his charge with the EEOC.

On July 13, 1987, the district court granted summary judgment in favor of the defendant Avdel on the ground that Jalil had failed to establish a *prima facie* case of either national origin discrimination or retaliatory discharge. Following his unsuccessful motion to vacate the summary judgment order, and while his appeal of the order was pending in this court, Jalil brought a second Title VII action in district court. In March 1988, however, the district court granted defendant's motion for summary judgment in the second action, holding the claim barred by *res judicata*. The district court also granted Avdel's

1. Jalil pursued several other avenues of relief as well, but succeeded in none. The New Jersey Division of Unemployment denied his claim for unemployment compensation. Likewise, his grievance filed pursuant to the governing collective bargaining agreement was rejected by the appointed arbitrator. The New Jersey Superior Court upheld the arbitrator's decision on appeal. Finally, the National Labor Relations Board rejected Jalil's complaint on the basis of the arbitrator's adverse decision.

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counterclaim for an injunction prohibiting Jalil from bringing further employment-related lawsuits unless he secures the permission of the court. Jalil appealed this decision as well. Because we reverse the first grant of summary judgment and remand for trial, the second district court judgment and the injunction effectively will be vacated.²

II.

In reviewing a grant of summary judgment, we apply the same test the district court should have employed initially. *Hankins v. Temple Univ.*, 829 F.2d 437, 440 (3d Cir. 1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of demonstrating the absence of material fact issues regardless of which party would have the burden of persuasion at trial. If the nonmoving party has the burden of persuasion at trial, "the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2555 (1986)), cert. dismissed, 108 S. Ct. 26 (1987).

The burden of proof in Title VII cases is governed by the framework erected in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and iterated by its progeny. *Jackson v. University of Pittsburgh*, 826 F.2d 230, 232 (3d Cir. 1987), cert. denied, 108 S. Ct. 732

2. Our jurisdiction is conferred by 28 U.S.C. § 1291 (1982).

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(1988). Plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. Once the plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to rebut the proof of discrimination by articulating some legitimate, nondiscriminatory reason for the employee's discharge. The ultimate burden of persuasion, which remains always with the plaintiff, may then be met by proving by a preponderance of the evidence that the alleged reasons proffered by the defendant were pretextual and that the defendant intentionally discriminated against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Hankins*, 829 F.2d at 440. The plaintiff may satisfy the ultimate burden of proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804-805). Circumstantial evidence may suffice to challenge the defendant's alleged reasons as pretextual. *Chipollini*, 814 F.2d at 895.

Because the plaintiff bears the burden of persuasion in Title VII actions, a defendant is entitled to summary judgment if it can demonstrate that the plaintiff could not carry the burden of proof at trial. The defendant may demonstrate this in two ways: it may show that the plaintiff is unable to establish a prima facie case of discrimination; or, if the plaintiff has successfully established a prima facie case, the defendant may win summary judgment by showing that the plaintiff could not produce sufficient evidence of pretext to rebut an assertion of nondiscriminatory reasons for the discharge.

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Summary judgment is inappropriate, however, if the plaintiff establishes a prima facie case and counters the defendant's proffered explanation with evidence raising a factual issue regarding the employer's true motivation for discharge. When the defendant's intent has been called into question, the matter is within the sole province of the factfinder. As we have pointed out before, because

intent is a substantive element of the cause of action--generally to be inferred from the facts and conduct of the parties--the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve any genuine issues of credibility.

Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981) (citing *Associated Hardware Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 121 (3d Cir. 1966)).

The district court here held that Jalil failed to establish a prima facie case of discrimination and retaliatory discharge because, it concluded, qualification for the job was an essential element of both claims, and Jalil's unquestionable insubordination made him unqualified. We reject the district court's analysis. Insubordination, under the *McDonnell Douglas* method of proof, plainly is not something the plaintiff must disprove to succeed at the first level of proof, but rather it is more logically a defense that is raised at the second level to meet the plaintiff's prima facie case of discrimination. See *Pollock v. American Tele. & Tel. Long Lines*, 794 F.2d 860, 863-64 (3d Cir. 1986) (insubordination, poor performance, and misconduct asserted as legitimate reasons for employee discharge); *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984) (discrimination may serve as a legitimate, nondiscriminatory reason for discharge); *Nulf v. Int'l*

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Paper Co., 656 F.2d 553, 559 (10th Cir. 1981) (insubordination held true reason for employee discharge); *Goodwin v. City of Pittsburgh*, 480 F. Supp. 627, 634 (W.D. Pa. 1979) (finding insubordination rationale to be pretextual and holding for plaintiff), *aff'd without opinion*, 624 F.2d 1090 (3d Cir. 1980); cf. *Bellissimo v. Westinghouse Elec. Corp.*, 764 F.2d 175, 181 (3d Cir. 1985) (inability to get along with supervisor is legitimate reason for discharge), *cert. denied*, 475 U.S. 1035 (1986).

To the extent employee qualification is an element of a Title VII action, we hold that plaintiff established it. Avdel employed Jalil for eight years and promoted him during that period to the "lead man" position in his department. Thus, his satisfactory performance of duties over a long period of time leading to a promotion clearly established his qualifications for the job. Cf. *Bellissimo*, 764 F.2d at 180 (plaintiff was qualified for the job although she could not prove that the poor performance reasons given for her discharge were pretextual); *Brown*, 746 F.2d at 1411 (plaintiff was qualified for the job and established a prima facie case of discrimination even though defendant established that she had been insubordinate).

III.

Having disposed of the "qualification" issue, we turn now to examine seriatim Jalil's two claims of discrimination. To establish a prima facie case of national origin discrimination, plaintiff must show that (1) he was a member of a protected class; (2) he was qualified for the job; and (3) he was discharged while other employees not in his protected class were retained. Cf. *Jackson v. University of Pittsburgh*, 826 F.2d at 233 (race discrimination); *Chipollini*, 814 F.2d at 897 (age discrimination); *Bellissimo*, 764 F.2d at 179 (sex discrimination). There is no dispute that

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plaintiff, Chilean in origin, is a member of a protected class. Further, as we noted above, Jalil qualified for the job. A review of the record leads us to conclude, however, that Jalil was unable to satisfy the third element of his *prima facie* case.

Jalil attempts to prove this aspect of his case with evidence that he previously submitted a grievance charging national origin discrimination, that two other employees were cited with insubordination but were not discharged, and that other employees wore radio headsets and were not disciplined. On review of the record, however, plaintiff's evidence lacks the necessary mortar with which to build a case of national origin discrimination. Jalil's earlier grievances are insufficient to support a Title VII claim, as they represent nothing more than mere allegations of discrimination. Cf. *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir.) (conclusory allegations of discrimination, absent particulars, insufficient to defeat summary judgment motion in Title VII case), cert. denied, 474 U.S. 899 (1985). The evidence that two other employees were not discharged despite their insubordination is likewise inadequate without some evidence of relevancy. Besides not demonstrating that the employees were similarly situated, plaintiff failed to show that the two employees were not members of the protected class.

Finally, the evidence regarding other employees wearing headsets is not persuasive. That evidence consisted of the plant manager's testimony at Jalil's unemployment compensation hearing that three years earlier an employee had been ordered to remove his headset radio and had complied, and Jalil's vague testimony at that hearing that other people wore radio headsets. Again, the evidence is simply too general, does not address the plaintiff's claim of national origin discrimination, and fails to make out a *prima facie* case.

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Jalil's claim of retaliatory discharge, however, has some real substance. The controlling standards are quite plain. To establish a prima facie case, plaintiff must show (1) that he engaged in a protected activity; (2) that he was discharged subsequent to or contemporaneously with such activity; and (3) that a causal link exists between the protected activity and the discharge. *Jordan v. Clark*, 847 F.2d 1368, 1376 (9th Cir. 1987), cert. denied sub nom. *Jordan v. Hodel*, 1989 U.S. LEXIS 170; *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73 (3d Cir. 1986).

We believe plaintiff succeeded in establishing all three elements. Jalil unquestionably engaged in a protected activity when he filed discrimination claims with the DCR and the EEOC. And, obviously, Jalil was discharged. He demonstrated the causal link between the two by the circumstance that the discharge followed rapidly, only two days later, upon Avdel's receipt of notice of Jalil's EEOC claim. See *Burrus v. United Tele. Co.*, 683 F.2d 339, 343 (10th Cir.) ("The causal connection may be demonstrated by evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action."), cert. denied, 459 U.S. 1071 (1982). Accordingly, Jalil established a prima facie case of retaliatory discharge.

At this point, the burden shifted to defendant to advance a legitimate, nondiscriminatory reason for discharging Jalil. Avdel easily met this burden by introducing evidence that plaintiff was fired for his insubordination in twice refusing to immediately remove his headset radio when so directed. To obtain summary judgment, then, Avdel needed to show that plaintiff could not raise an issue of fact regarding whether defendant's proffered explanation was pretextual. *Pollock*, 794 F.2d at 865.

An objective review of the record convinces us, however, that Jalil introduced sufficient evidence to

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call into question Avdel's true motivation in discharging him and, accordingly, to defeat Avdel's motion for summary judgment. The timing of the discharge in relation to Jalil's EEOC complaint may suggest discriminatory motives on the part of Avdel.³ Moreover, the absence of a written rule against radio headsets and the presence of a dispute whether there was an unwritten rule could permit the inference, in light of the timing of the discharge, that Avdel was harassing Jalil, trying to induce his insubordination to have a pretext for firing him. *see Brown*, 746 F.2d at 1411; *Nulf*, 656 F.2d at 559, or it could suggest the very real possibility that Avdel "seized upon this instance of insubordination to fire" Jalil. *See Leonard v. City of Frankfurt Elec. & Water Plant*, 752 F.2d 189, 195 (6th Cir. 1985). In any event, the evidence created a factual issue regarding motivation that properly belongs to the factfinder.

Defendant argues that the arbitrator's decision, affirmed by the New Jersey Superior Court, finding Jalil's insubordination to be the true reason for his discharge justifies summary judgment in this case. We do not agree. Although an arbitral determination may be accorded great weight if it gives full consideration to an employee's Title VII rights. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974), it cannot, in itself, be dispositive of a Title VII claim because the Civil Rights Act of 1964 vests final

3. Although this fact is important in establishing plaintiff's prima facie case, there is nothing preventing it from also being used to rebut defendant's proffered explanation. As we have observed before, the *McDonnell Douglas* formula

does not compartmentalize the evidence so as to limit its use to only one phase of the case. The plaintiff's evidence might serve both to establish a prima facie case and discredit a defendant's explanation.

Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984).

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responsibility for the enforcement of Title VII in the federal courts. The provisions of the Act "make plain that federal courts have been assigned plenary powers to secure compliance with Title VII." *Id.* at 45. The arbitral determination in Jalil's case apparently did not at all consider a retaliatory discharge claim. The only claim advanced by the Union in that arbitration seems to have been that Jalil suffered discrimination because of his union activity. Thus, the decision is not due the great weight necessary to achieve summary judgment for the defendant. *Compare Darden v. Illinois Bell Tele. Co.*, 797 F.2d 497, 504 (7th Cir. 1986).

IV.

We hold that the district court properly granted summary judgment for defendant on plaintiff's national origin discrimination claim, but erred in granting Avdel summary judgment on the retaliatory discharge claim. Plaintiff established a prima facie case of retaliatory discharge, and countered defendant's explanation for Jalil's termination with sufficient evidence to raise a genuine issue of fact as to defendant's true motivation for firing him. The matter was therefore within the sole province of the finder of fact and could not be resolved on summary judgment. Accordingly, we will reverse the grant of summary judgment on the retaliatory discharge claim and remand the case for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

**APPENDIX E — ORDER OF THE UNITED STATES
DISTRICT COURT, DISTRICT OF NEW JERSEY IN CIVIL
ACTION NO. 87-4457 BY HON. HAROLD A. ACKERMAN
ENTERED ON MARCH 3, 1988**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 87-4457

RICHARD JALIL,

Plaintiff,

v.

AVDEL CORPORATION,

Defendant.

This matter having been opened to the Court by Grotta, Glassman & Hoffman, P.A., attorneys for defendant Avdel Corporation, Jed L. Marcus, Esq., appearing, and the Court having considered the pleadings, briefs, affidavit and without oral argument pursuant to Fed.R.Civ.P. 78, and good cause appearing;

It is on this ____ day of February, 1988;

ORDERED that defendant's motion for summary judgment is granted and the within complaint be and the same is hereby dismissed with prejudice;

IT IS FURTHER ORDERED that defendant's motion for summary judgment on its counterclaim is hereby granted and plaintiff is permanently enjoined from filing with this federal court any further complaints regarding the subject matter of plaintiff's

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complaint or any matter arising out of plaintiff's employment with or termination of employment by Avdel Corporation without receiving the Court's permission to do otherwise; and

IT IS FURTHER ORDERED that defendant's request for fees and costs is hereby denied; and

IT IS FURTHER ORDERED that plaintiff's request for appointment of counsel is hereby denied.

s/ Harold A. Ackerman
HAROLD A. ACKERMAN
U.S.D.J.

**APPENDIX F — OPINION OF HON. HAROLD A.
ACKERMAN IN JALIL v. AVDEL CORP., NO. 87-4457 FILED
MARCH 1, 1988**

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 87-4457

RICHARD JALIL,

Plaintiff,

v.

AVDEL CORPORATION,

Defendant.

OPINION

ACKERMAN, District Judge.

This is an action brought under Title VII of the Civil Act of 1964, 42 U.S.C. § 2000e-5, and is presently before the court on motion of defendant, Avdel Corporation, for summary judgment and for the imposition of an injunction to enjoin plaintiff, Mr. Ricardo Jalil from instituting any further legal actions concerning any matter which has been or could have been decided in Jalil's previous employment discrimination suits. Also before the court is plaintiff's request for appointment of counsel. I have reviewed all of these matters without oral argument pursuant to Fed.R.Civ.P. 78.

The present action was commenced on November 5, 1987. In his complaint, plaintiff alleges that Avdel Corporation

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discriminatorily terminated his employment in retaliation for filing charges of employment discrimination with the Equal Employment Opportunity Commission and for exercising his rights under Section 7 of the National Labor Relations Act. Moreover, plaintiff asserts that defendant discriminated against plaintiff on the basis of national origin. On January 7, 1988, defendant filed its answer and asserted the affirmative defense that plaintiff's present action is barred by the doctrine of *res judicata*. Defendant also lodged a counterclaim in which it seeks that this court enter an injunction against plaintiff to enjoin him from filing any further complaints relating to plaintiff's employment with defendant. Also on January 7, 1988, defendant filed its notice of motion for summary judgment on this counterclaim and to dismiss the complaint with prejudice.

Summary judgment may only be granted if, drawing all inferences in favor of the nonmoving party, the pleadings, admissions, affidavits, and responses to discovery demonstrate there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Chippolini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) cert. dism'd, 108 S. Ct. 26 (1987). In the case at bar, however, even viewing the facts in a light most favorable to the nonmovant, I must conclude, as a matter of law, that the existence of any genuine issues of material fact upon which a trial must be held is irrelevant since this action must be dismissed on the grounds of *res judicata*. A review of plaintiff's prior employment related lawsuits reveals that the suit presently before the court is merely an attempt to relitigate claims upon which there have already been decisions on the merits.

On December 8, 1986, plaintiff filed a suit in which he alleged, *inter alia*, that defendant engaged in unlawful employment discrimination in violation of Title VII. This action, entitled *Jalil v. Avdel Corp.*, Civil Action No. 86-4878, was assigned to my

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colleague, the Honorable Dickinson R. Debevoise. On July 13, 1987, Judge Debevoise granted defendant's motion for summary judgment and dismissed plaintiff's Title VII claim because plaintiff failed to establish a *prima facie* case of discriminatory conduct. *Jalil v. Avdel Corp.*, No. 86-4878, slip op. at 3-4 (D.N.J. July 13, 1987) (unpublished).

A comparison of the complaint in that action with the one filed in the suit before me illustrates that plaintiff is asserting the identical claim that Judge Debevoise dismissed. Therefore, even construing this *pro se* complaint, as I must, in a liberal fashion, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Hurd v. Romeo*, 752 F.2d 68, 70 (3d Cir. 1985), I find that plaintiff is merely seeking to relitigate claims upon which there has already been a final judgment on the merits.

The law clearly establishes that the existence of such a "final judgment rendered on the merits . . . precludes relitigation between the same parties or privies." *Donegal Steel Foundry Co. v. Accurate Products Co.*, 516 F.2d 583, 587 (3d Cir. 1975). This principle, known as the doctrine of *res judicata*, advances the goal of judicial finality by obviating the pursuit of vexatious and repetitious claims upon which the plaintiff has had the opportunity to fully present his case. *Purter v. Heckler*, 771 F.2d 682, 690 (3d Cir. 1985).

My review of the record reveals that there has been a final judgment on the merits of Jalil's discrimination claim and that this prior suit involved both the same parties, *i.e.*, Mr. Jalil and Avdel Corporation, and cause of action, *i.e.*, unlawful discrimination, as the one before me for consideration today. *See id.* at 690. Most importantly, plaintiff has had the opportunity to fully present his arguments and evidence in support of his claims prior to the entry of final judgment.

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Similarly, his claim that he has been discriminated against on the basis of his union activities has been reviewed by a labor arbitrator in a case entitled *In re United Electrical Radio & Machine Workers & Avdel Corp.* Furthermore, the decision of the arbitrator that discriminatory treatment has not occurred has been confirmed by the Superior Court of New Jersey, Chancery Division on October 10, 1986. In those suits, Mr. Jalil, through his union, sued Avdel. Therefore, the identical parties and privies were again engaged in litigation upon which there was an opportunity to present evidence and the entry of a final judgment with respect to plaintiff's union activity claim. Therefore, assuming this court has jurisdiction with respect to this issue, there has been a final judgment on the merits of the claim and therefore the claim is barred by the doctrine of *res judicata*.

Thus, since all of the claims raised in the within complaint have been presented elsewhere and final judgments have been entered, the instant claims must be dismissed by operation of the doctrine of *res judicata*.

My decision, however, does not leave plaintiff without an avenue through which to pursue relief. I am cognizant of the fact that on August 4, 1987, plaintiff appealed the decision of Judge Debevoise to the Court of Appeals for the Third Circuit. Should the Court of Appeals find Judge Debevoise's conclusions were improper, that Court will direct him to so modify his prior decision. Thus, in dismissing Mr. Jalil's complaint, I do so noting that he was aware of the proper avenue through which to attack the prior decision of the federal court and the action before me is merely an attempt to relitigate his claims at the trial level while awaiting the decision of the Court of Appeals.

I now turn to plaintiff's request for the appointment of

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counsel. Upon review of the record, it is clear that this suit is barred by the doctrine of *res judicata*, and therefore even the most artful attorney could not save plaintiff's claims in this matter since the suit must be dismissed as a matter of law.

Similarly, in light of my disposition that plaintiff's claims are barred by the doctrine of *res judicata*, I find it unnecessary to address his request to compel discovery.

Turning now to defendant's request that I issue an order enjoining plaintiff from filing suits concerning his former employment with Avdel, I note that the All Writs Act, 28 U.S.C. § 1651(a), implicitly authorizes the district court to issue an order that restricts the filing of meritless cases by a litigant whose multiple complaints raise claims that are similar to those upon which there has been a final judgment. See *In re Oliver*, 682 F.2d 443, 445 (3d Cir. 1982). In *Oliver*, the Court of Appeals, agreeing with the decisions of the First and District of Columbia Circuits, held that "a continuous pattern of groundless and vexatious litigation can, at some point, support an order against further filing of complaints without permission of court." *Id.* at 446. Thus, litigiousness plus a history of meritless suits may justify the imposition of an injunction against the filing of such suits upon request of the harassed defendant provided that plaintiff is given an opportunity to oppose the order before it is instituted. See *id.* at 445 n.5, 446. It is beyond dispute, however, that the "regular implementation of such an order cuts against the precept that access to the courts is a fundamental tenet of a judicial system" and that "legitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be." *Id.* at 446.

In the case at bar, however, I find that even before filing his first federal lawsuit, the record reflects that plaintiff pursued

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his employment-related claims in forums such as labor arbitration, as well as before the National Labor Relations Board, Equal Employment Opportunity Commission, Superior Court of New Jersey, Chancery Division and the Appeals Tribunal of the Unemployment Compensation Board. In each forum, the decision-maker found plaintiff's claims to have been unsupported. Clearly, plaintiff has now resorted to every available forum in which to bring his claims and has not been successful. While each of the suits represented his efforts to pursue valid avenues for relief, plaintiff now brings these claims once again in federal court and this in itself is clearly contrary to the notions of repose and finality of judgments. Therefore, in light of plaintiff's history of litigiousness with respect to claims which have proceeded to final judgment and given the fact plaintiff has had notice of and has had an opportunity to respond to defendant's request for injunctive relief, I find that plaintiff's continued filings with respect to his employment related claims would be frivolous. Therefore, I will enjoin him from filing future law suits with respect to his employment-related claims against Avdel in federal district court without receiving permission to do otherwise.

Finally, with respect to defendants request for fees and costs, I find that while plaintiff has brought repetitive suits in a variety of forums, I, like Judge Debevoise, must conclude that one of the costs of doing business is the reality that one may encounter litigious individuals. As I stated previously, while plaintiff has pursued his claims in the available forums and the case before me is identical to that previously decided upon the merits in this forum, I will not award fees at this time.

In conclusion, I will grant defendant's motion for summary judgment and request for injunctive relief, deny plaintiff's request for appointment of counsel, and deny defendant's request for fees.

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An order in conformance with this opinion has been filed with the court.

I HEREBY CERTIFY that the above and foregoing is a true correct copy of the original on file in my office.

ATTEST:

WILLIAM T. WALSH, Clerk
United States District Court
District of New Jersey

s/ Carol Coleman
Deputy Clerk

**APPENDIX G — ORDER OF THE UNITED STATES
DISTRICT COURT, DISTRICT OF NEW JERSEY IN CIVIL
ACTION NO. 86-4878 BY HON. DICKENSON R. DEBEVOISE,
FILED JULY 13, 1987**

THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

HON. DICKINSON R. DEBEVOISE

Civil Action No. 86-4878 (DRD)

RICARDO JALIL,

Plaintiff,

vs.

AVDEL CORPORATION,

Defendant.

This matter having been opened to the Court by Grotta, Glassinan & Hoffman, P.A., attorneys for defendant Avdel Corporation (Jed. L. Marcus, Esq., appearing), upon notice to plaintiff Ricardo Jalil, and the Court having considered the briefs and other papers submitted by the parties, and good cause appearing and for the reasons set forth in a bench opinion.

IT IS on this 13th day of July, 1987:

ORDERED that, pursuant to Rule 56 of the Federal Rules of Civil Procedure, plaintiff's complaint be and hereby is dismissed.

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IT IS FURTHER ORDERED that defendant's motion for fees and costs in amount to be determined by this Court is denied.

s/ Dickenson R. Debevoise,
DICKENSON R. DEBEVOISE,
U.S.D.J

**APPENDIX H — OPINION OF HON. DICKINSON R.
DEBEVOISE, U.S.D.J. IN *JALIL v. AVDEL CORP.*, No.
86-4878, FILED AUGUST 3, 1987**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

Civil No. 86-4878

RICARDO JALIL,

Plaintiff,

v.

AVDEL CORP.,

Defendant.

**TRANSCRIPT OF PROCEEDINGS
OPINION**

Newark, New Jersey
July 13, 1987

BEFORE:

HONORABLE DICKINSON R. DEBEVOISE
UNITED STATES DISTRICT JUDGE

Appearances:

(No appearances.)

*Appendix H***I. INTRODUCTION**

Plaintiff Ricardo Jalil appearing *pro se* filed this suit against Avdel Corp. ("Avdel" or "the Company") on December 8, 1986. As established by the pretrial scheduling order entered on May 11, 1987, plaintiff asserts three claims. First, plaintiff alleges that Avdel terminated his employment because of his national origin and in retaliation for filing a charge with the Equal Employment Opportunity Commission ("EEOC") in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.* Second, plaintiff seeks to vacate the decision of Arbitrator John Stochaj which held that Avdel discharged plaintiff for good cause because of his insubordination and unsafe conduct. Plaintiff seeks to overturn the award despite the fact that the Superior Court of New Jersey previously confirmed that award. Third, plaintiff appeals a decision by the General Counsel to the National Labor Relations Board ("NLRB") to dismiss plaintiff's unfair labor practice charge against Avdel.

Avdel now moves for summary judgment pursuant to Fed. R. Civ. P. 56 on the following grounds: (1) Avdel terminated plaintiff's employment because of insubordination and not because of his national origin nor in retaliation for filing an EEOC charge; (2) the court is without subject matter jurisdiction to consider plaintiff's appeal of the General Counsel's decision; and (3) plaintiff's appeal of the arbitrator's decision must be dismissed because it is barred by the doctrine of *res judicata* and furthermore, by the statute of limitations. Plaintiff's opposition appears to be limited to arguing that the arbitrator's decision was procured by "undue means" and that the arbitrator erred in concluding that plaintiff had been dismissed "for cause". For the reasons that follow, I conclude that Avdel is entitled to summary judgment against the plaintiff.

*Appendix H***II. FACTUAL AND PROCEDURAL BACKGROUND**

Avdel operates a plant in Parsippany, New Jersey. It manufactures metal fasteners used in the production of, among other things, trucks, cars and planes. Avdel hired plaintiff as a production employee in October 1977. Plaintiff first became involved in union activities in 1979 and has served as shop steward, assistant shop steward, and was ultimately elected president of Amalgamated Local 417. In January 1985, Avdel promoted plaintiff to a position as "lead man in the Baird Department of the Company. The exhibits submitted by the parties indicate that he had several run-ins with Avdel in September 1985, which apparently culminated in his suspension for absenteeism.¹ See Defendant's Exhibit B. Plaintiff then filed a complaint with the EEOC on October 17, 1985 charging the Company with discrimination on the basis of national origin and union activity. The Company received the charges on October 28, which is when the events resulting in his termination began.

On Monday, October 28, 1985, plaintiff's foreman, Adolf Nier, observed plaintiff wearing a "walkman" radio with earphones. Avdel has adopted and posted safety procedures in the plant which require, among other things, that employees wear earplugs at all times when entering any plant area. Although there is no written policy, Avdel asserts that it does not permit employees in production areas to wear radio earphones based on its concern that employees be able to communicate with others despite the

1. Avdel asserts that plaintiff had a history of disciplinary and attendance problems at the Company and that he was warned and suspended on three separate occasions, one of which involved insubordination. See Defendant's Exhibit B. Plaintiff maintains that he was subject to repeated harassment by the Company after he became involved with the union.

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noise of large machinery. Plaintiff, on the other hand, asserts that other employees wore radio earphones but were not reprimanded by the employer.

On the day in question, plaintiff was told to remove the radio earphones and twice refused. After he was told a third time, he then removed them. *See Defendant's Exhibit A, Tr. at 25.* On Wednesday, October 30, 1985, plaintiff again wore the radio headset while he worked. His foreman, Nier, again directed plaintiff to remove it. Again plaintiff refused to comply. Nier reported plaintiff's refusal to comply with his directions to Plant Manager Stephen Getten. Getten and Nier met with plaintiff and Getten told plaintiff to remove the earphones and that his failure to do so was insubordination. Plaintiff refused to remove the earphones and told Getten and Nier either to "Get the hell away from here" or "Get away from here". (Plaintiff denies using the word "hell".) He then turned his back on the two men and walked away.

In sworn testimony before the Unemployment Appeals Examiner, plaintiff admitted substantially all of these facts. *See Defendant's Exhibit B, Tr. at 19, 20, 25.* In light of these events, on October 30, 1985, Avdel terminated plaintiff's employment because he "willfully and knowingly engaged in unsafe conduct despite repeated warnings and because of (his) gross insubordination." Defendant's Exhibit F (Notice of Termination).

Following termination of employment, plaintiff filed a grievance through his union, pursued his grievance in arbitration, filed charges of discrimination with the NLRB and EEOC, and sought unemployment compensation. None of these claims has been resolved in his favor.

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Plaintiff filed a grievance pursuant to Article XII of the collective bargaining agreement governing the terms of his employment with Avdel. The grievance alleged, among other things, that plaintiff "was fired because he filed a discrimination charge . . . (and has) been retaliated against in violation of the Civil Rights Act of 1964, for having filed a charge against the employer." Defendant's Exhibit G.

Avdel and the union jointly selected Dr. John Stochaj from a panel of arbitrators provided by the New Jersey State Board of Mediation, and a hearing was conducted on March 11, 1986. The plaintiff was represented by the union, which presented witnesses and which argued that plaintiff was discharged based on race discrimination and union activities as union president.

The arbitrator issued a decision on May 12, 1986, wherein he held that Avdel had just cause for terminating plaintiff's employment. Defendant's Exhibit H. The arbitrator concluded that plaintiff was fired for insubordination and had failed to comply with reasonable orders:

. . . (A)n experienced Union representative, no matter how militant, knows that the rule is to obey and grieve later. As a Union President Jalil knows that in order to properly implement a collective bargaining agreement workers cannot simply rely on their own judgment to decide if something is proper or not but are to use the dispute settlement procedure provided for in the contract. To do otherwise would result in chaos for both the Union

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and the Company.² (Court's Footnote)

(T)he arbitrator remains mindful of the admission of the grievant that he twice disregarded a legitimate order. This leads the Arbitrator to believe that the grievant reacted similarly on October 28th when he was instructed to remove the walkman on at least one occasion.

Id. at 5-6.

The arbitrator also rejected plaintiff's contention that he was discharged for his union activities:

(The claim) that the grievant's union activity precipitated the discharge, compels this Arbitrator to note that the OSHA incident (in which plaintiff filed a safety complaint against Avdel) happened in 1981 and here we are in the later part of 1985. Furthermore, the Company had made the grievant a lead man after he began his activity with the Union. Why would a company reward an employee who supposedly was so active with the Union especially to a position of leadership within the

2. It should be noted that on the day of plaintiff's discharge, all of the workers walked out and refused to return to work, in protest of his dismissal. Plaintiff apparently urged his coworkers to return to work to avoid jeopardizing their jobs. It appears that these activities led to the issuance of an Order to Show Cause by Judge Sarokin on October 31, 1985, as to why the union members should not be restrained from proceeding with their strike. *Avdel, Division of Newman Industries, Inc. v. United Electrical, Radio and Machine Workers of America, Local No. 417, and Ricardo Jalil, individually and as President of Local 417, No. 85-5185* (D.N.J. Oct. 31, 1985).

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workforce and not to an "up and out" position? . . . (T)he Arbitrator is just not convinced that the employee was terminated because of his union activity.

Id. at 6.

On July 28, 1986 plaintiff and the union filed an action in state superior court to vacate the arbitrator's award. The court dismissed plaintiff's action and confirmed the award. Defendant's Exhibit I, *United Electrical, Radio and Machine Workers of America, Local 417 v. Avdel Corp.*, Docket No. C-4319-86E, Superior Court of New Jersey, Chancery Division, Morris County (October 10, 1986). The court, in confirming the award, acknowledged that the arbitrator had expressly found no evidence of discrimination, either racial or ethnic, or evidence of discrimination based on plaintiff's union activities. *Id.* at 5.

On October 31, 1985 plaintiff filed an unfair labor practice charge against Avdel with the NLRB. He alleged that he was discharged because of his union activities. See Defendant's Exhibit J. On December 17, 1985, the Regional Director for the NLRB administratively deferred the matter to the parties' grievance procedures provided for in the collective bargaining agreement. See Defendant's Exhibit K. After the arbitrator rendered his decision, the Regional Director reviewed the award and concluded that the proceedings were fair and in accordance with the National Labor Relations Act; accordingly, he dismissed plaintiff's charge on August 20, 1986. See Defendant's Exhibit L. Plaintiff then appealed that decision to the General Counsel of the NLRB, which denied the appeal on October 24, 1986. See Defendant's Exhibit N.

The plaintiff also sought but was denied unemployment

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compensation for the first six weeks after his termination, which was upheld on appeal by the Appeals Tribunal of the Unemployment Division. *In re Jalil*, AT-W85-5365 (December 18, 1985). See Defendant's Exhibit O. The Appeals Examiner, after a full hearing conducted on December 16, 1985, concluded as follows:

The claimant was discharged on his last day of work for failure to comply with directions given to him by both his foreman and plant manager, and (was) insubordinate toward the plant manager.

On October 28, 1985, the claimant was wearing a headset which was attached to a devise that allowed him to listen to music. He was informed on that day several times not to wear it and finally removed it. On the last day of work, October 30, 1985, the claimant again was wearing this equipment. He was informed at that time by both the foreman and plant manager that he could not wear this, that he had to just wear his safety earplugs. The claimant made a disparaging statement to the plant manager when he was asked to remove them.

Id. The decision of the Appeals Examiner was reaffirmed by the Unemployment Division's Board of Review. *In re Jalil*, BR-85-2103-C (January 2, 1986). See Defendant's Exhibit P. The Board noted that plaintiff was given a full and impartial hearing and a complete opportunity to offer any and all evidence. *Id.*

On October 31, 1985, plaintiff filed a charge with the EEOC alleging that he was discharged in retaliation for having filed an

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earlier charge on October 17, 1985 and because of his national origin. The EEOC is still investigating this charge, and no "right to sue" letter has been issued.

III. DISCUSSION

A. Summary Judgment Standard

In order to prevail on a motion for summary judgment, the moving party must establish that "there is no genuine issue as to any material fact and that (it) is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986), *rev'g* 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Building Co. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita*, 106 S. Ct. at 1356. All evidence submitted must be viewed in a light most favorable to the party opposing the motion. *Wahl v. Rexnord*, 624 F.2d 1169, 1181 (3d Cir. 1980).

B. Title VII Claim

To maintain a claim under Title VII, plaintiff must first establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish a *prima facie* case of national origin discrimination, plaintiff must show

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that: (1) he was a member of a protected class; (2) he was qualified for the job; and (3) he was discharged while other employees not in his protected class were retained. *See Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175, 179 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1244 (1986). Similarly, a *prima facie* case of retaliation requires plaintiff to show that he was qualified for the job. *See Mitchell v. Baldridge*, 759 F.2d 80, 86 n.5 (D.C. Cir. 1985); *Caldwell v. Mobil Chemical Co.*, 39 F.E.P. Cas. (BNA) 1262 (D.N.J. 1985), *aff'd mem.*, 786 F.2d 1145 (3d Cir. 1986). In short, "the issue of an employee's qualification is relevant at each stage of the *McDonnell-Douglas* analysis." *O'Hara v. Board of Education*, 590 F. Supp. 696, 704 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985).

In the present case, plaintiff cannot establish a *prima facie* case of discrimination based either on national origin or retaliation. This is because plaintiff has failed to meet the second prong of the *McDonnell-Douglas* test--i.e., that he was qualified for the job. When the record establishes that the plaintiff was guilty of insubordination for failing to obey his supervisors, the plaintiff has failed to demonstrate that he "was satisfying the normal requirements of (his) job." *Hughes v. Chesapeake and Potomac Telephone Co.*, 583 F. Supp. 66, 70 (D.D.C. 1983). *See Ekanam v. Health & Hospital Corp.*, 724 F.2d 563, 568 (7th Cir. 1983), *cert. denied*, 469 U.S. 821 (1984) (plaintiff failed to prove a *prima facie* case of retaliation when he was discharged for sleeping on the job); *Williams v. Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 985 (1981), (plaintiff failed to prove a *prima facie* case when he was discharged for lying); *Jacobs v. Bolger*, 587 F. Supp. 374, 376 (W.D. La. 1984), *aff'd mem.*, 759 F.2d 20 (5th Cir. 1985) (plaintiff guilty of "inordinate tardiness" had "completely failed even to prove a *prima facie* case"). Plaintiff has admitted in sworn testimony that he refused on two occasions

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to comply with his supervisors' instructions and was warned that failure to comply would constitute insubordination. "Based upon plaintiff's own admissions, it is difficult to understand how he can contend that he was satisfying the requirements of his position." *Caldwell*, 39 F.E.P. Cas. (BNA) at 1264. Hence, plaintiff's discrimination claim under Title VII must be dismissed based on his failure to establish a *prima facie* case.³

C. Plaintiff's Challenge to the NLRB's Determination

As established by the pretrial order entered on May 12, 1987, plaintiff also asserts that the NLRB's General Counsel erred in dismissing his claim. However, the General Counsel has absolute authority not to issue a complaint. Section 3(d) of the NLRA, 29 U.S.C. Section 153(d), provides in part:

The General Counsel of the Board . . . shall have *final authority*, on behalf of the Board, in respect of the investigation of charges and issuance of complaints . . . and in respect of the prosecution of such complaints before the Board. . . .

(emphasis added).

3. Plaintiff has not received right-to-sue letters from the EEOC, which is still considering his charge. However, the court nevertheless has subject matter jurisdiction, since the issuance of "such a letter is not a 'jurisdictional' requirement in the constitutional sense, but rather a statutory requirement designed to give the administrative process an opportunity to proceed before a lawsuit is filed." *Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 358 (3d Cir. 1984). "It is a sound and established policy that procedural technicalities should not be used to prevent Title VII claims from being decided on their merits." *Id.* at 359. See also *Bradford v. General Telephone Co. of Michigan*, 618 F. Supp. 390, 395 (W.D. Mich. 1985).

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The courts have held that "the final authority language of Section 3(d) suggests an *absolute* discretion and . . . have uniformly construed the section as precluding judicial review of the General Counsel's decision not to issue a complaint" *Mobilab Union, Inc. v. Johansen*, 600 F. Supp. 826, 828 (D.N.J. 1985). Thus, "federal courts indeed do not have jurisdiction to review the decision of the General Counsel in refusing to issue a complaint." *Newspaper Guild, Erie Newspaper Guild, Local 187 AFL-CIO v. NLRB*, 489 F.2d 416, 426 (3d Cir. 1973). *Accord Vaca v. Sipes*, 386 U.S. 171, 182 (1967). Hence, plaintiff's "appeal" of the General Counsel's determination must be dismissed.⁴

D. Plaintiff's Challenge to the Arbitrator's Decision

Plaintiff also seeks to vacate the arbitration award on the ground that the arbitrator, in determining that plaintiff had been discharged for insubordination and unsafe conduct, had "engaged in 'undue means'" under N.J.S.A. 2A:24-8(a) (court shall vacate arbitration award that was procured by corruption, fraud or undue means). As already noted, the Superior Court of New Jersey confirmed the award on October 10, 1986.

Under the Full Faith and Credit Act, 28 U.S.C. Section 1738, federal courts must give preclusive effect to state court judgments whenever the courts of the state from which the judgment

4. Similarly, to the extent that plaintiff alleges a breach of the union contract, that claim must also be dismissed because plaintiff has not alleged that the union violated its duty of fair representation in representing plaintiff in the contract grievance and arbitration procedures. *See United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 62 (1981); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976).

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emerged would do so. *Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Wood v. Garden State Paper Co.*, 577 F. Supp. 632, 634 (D.N.J. 1983). The preclusive effect of the state court judgment in federal court must be determined according to state law.

In New Jersey, a prior judgment will bar a subsequent action under the doctrine of *res judicata* when (1) the parties are identical in both suits; (2) a court of competent jurisdiction has rendered a final judgment; and (3) the issues before the court are the same. *City of Hackensack v. Winner*, 162 N.J. Super. 1, 28 (App. Div. 1978), *modified on other grounds*, 82 N.J. 1 (1980). *Accord Roberts v. Goldner*, 79 N.J. 82, 85 (1979).

In the present case, plaintiff and the union jointly brought an identical action against Avdel in state court to vacate the arbitration award. Hence, the parties are the same in both suits. The state court was competent to render a judgment confirming the arbitration award. See N.J.S.A. 2A:24-7 (conferring jurisdiction on New Jersey state courts to confirm or vacate an arbitration award). See also *Smith v. Evening News Ass'n*, 371 U.S. 195, 200-201 (1962) (state courts have concurrent jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185). The superior court confirmed the decision of the arbitrator, holding that the arbitrator had not exceeded his authority and that the award was not procured by undue means. *United Electrical, Radio and Machine Workers of America, Local 471 v. Avdel Corp.*, No. C-4319-86E, Slip op. at 3 (October 10, 1986). Hence, the same issues now raised before this court were already considered and rejected by the state court.

Plaintiff argues that the state court erred in confirming the arbitrator's award. However, "the *res judicata* consequences of a final, unappealed judgment on the merits (are not) altered by

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the fact that the judgment may have been wrong. . . . (A)n 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata*. . . .' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The proper procedure would have been for plaintiff to appeal the state court's decision to the Appellate Division. This plaintiff did not do. Hence, plaintiff's challenge to the arbitration decision must be dismissed.⁵

E. Defendant's Motion for Attorney's Fees

Defendant Avdel seeks an assessment of attorney's fees against the plaintiff on the asserted ground that plaintiff's claims are patently frivolous and in bad faith. A court is authorized to award a prevailing party attorney's fees under 42 U.S.C. Section 2000e-5(k). The decision whether to award such fees is within the discretion of the court. *Id.* Despite the frivolous nature of plaintiff's claims, I will deny Avdel's motion for fees. Although there is some authority for awarding fees against a *pro se* plaintiff, see e.g., *Daily v. District 65, U.A.W.*, 505 F. Supp. 1109 (S.D.N.Y. 1981); *Kane v. City of New York*, 468 F. Supp. 1109 (S.D.N.Y.), aff'd mem., 614 F.2d 1288 (2d Cir. 1979), I am not entirely certain that plaintiff fully understands what is and is not appropriate, both procedurally and substantively. Additionally, plaintiff appears to be an individual of quite limited means, as evidenced by his application to proceed *in forma pauperis*. Hence, no fees or costs will be awarded.

5. Here, even if the doctrine of *res judicata* did not apply, plaintiff's action would still be barred by the statute of limitations since he filed this action on December 8, 1986, at least two months after the expiration of the three-month limitations period governing applications to vacate arbitration awards. See N.J.S.A. 2A:24-7.

*Appendix H***IV. CONCLUSION**

The motion by defendant Avdel Corporation for summary judgment under Fed. R. Civ. P. 56 will be granted because (1) plaintiff has failed to establish a *prima facie* case of discrimination under Title VII of the Civil Rights Act of 1964, (2) the court is without subject matter jurisdiction to review the NLRB General Counsel's decision, and (3) plaintiff's application to vacate the decision of the arbitrator is barred by the doctrine of *res judicata* and by the statute of limitations. The motion by Avdel for attorney's fees will be denied. I will sign the order submitted by counsel for the defendant.

**APPENDIX I — DECISION OF THE SUPERIOR COURT OF
NEW JERSEY GENERAL EQUITY—MORRIS COUNTY, NO.
C-4319-86E BY HON. ARNOLD M. STEIN, J.S.C. FILED
OCTOBER 10, 1986**

**SUPERIOR COURT OF NEW JERSEY
GENERAL EQUITY — MORRIS COUNTY**

DOCKET NO. C-4319-86E

**UNITED ELECTRICAL, RADIO AND MACHINE WORKERS
OF AMERICA, LOCAL 417 AND RICARDO JALIL,**

Plaintiff,

-vs-

AVDEL CORPORATION,

Defendant.

**October 10, 1986
Morris County Courthouse
Morristown, New Jersey**

BEFORE:

THE HONORABLE ARNOLD M. STEIN, J.S.C.

APPEARANCES:

**OXFELD, COHEN & BLUNDA, ESQS.
BY: RONALD MARTIN SALZER, ESQ.
Attorneys for the Plaintiff**

**GROTTA, GLASSMAN & HOFFMAN, ESQS.
BY: STEPHEN S. MAYER, ESQ.
Attorneys for the Defendant.**

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ORDERED BY:

Grotta, Glassman & Hoffman, Esqs.

DONNA L. RINALDI
CERTIFIED SHORTHAND REP.
LICENSE NO. 01310

THE COURT: The plaintiff brings this action by order to show cause for purpose of seeking to vacate an ordinance by the arbitrator in this matter. There is a cross-motion by defendant employer seeking to confirm the order of the application.

Plaintiff was employed by the defendant, Avdel Corporation from October 1977 until the date of his termination October 30, 1985. What is in dispute is his termination and the upholding of that termination by the arbitrator. The basis for the discharge was, "Willfully and knowingly engaging in unsafe conduct despite repeated warnings and because of gross insubordination." The unsafe conduct alleged was a wearing of a walk-man radio while working.

The work of Avdel involves the use of heavy machinery. The insubordination was Jalil's refusal to remove the walk-man after being repeatedly told to do so by his supervisor and by the manager.

Now, the contention of the plaintiff was that he was not insubordinate and that he obeyed the instruction to remove the walk-man. As a result of his discharge a grievance was filed by the plaintiff and the dispute was heard by an arbitrator jointly selected by labor and management. The issue before the arbitrator was whether or not the plaintiff was discharged for cause. The arbitrator found that there was insubordination on the part of

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Mr. Jalil. The arbitrator found that while there was one instance of where Mr. Jalil agreed to take off the walk-man after having been repeatedly told to do so, there was a later incident in which he told his supervisor when instructed to or requested to remove the walk-man and in substance, "Get the hell out of here." Then he refused to take it off, the walk-man.

It was the contention of the plaintiff that there was racial or ethnic discrimination being applied against him and also that certain pressures were being applied against him because he was a union representative. Plaintiff was president of Local 417. The arbitrator found that these grounds alleged by Mr. Jalil did not exist.

It is the contention of the plaintiff that the arbitrator's award must be overturned because it is in violation of the arbitrator's statutory powers C22A:24-8, subsection D or in the alternative that the arbitration award was procured by undue means.

I have searched the record in this case, and I have found no evidence that the arbitrator's award was procured by undue means or that the powers of the arbitrator were exceeded. First of all, the Courts of this State recognize that proposition that when the parties agree by contract to submit there matter to dispute resolution arbitrators, unless the statutory grounds exist, the arbitrator's award is not to be overturned. We are not second judges of what the arbitrator did. To put it in simpler terms we are not second guessers of what the arbitrator did. We are not here to say that given the same set of facts, we would come to different conclusions or given the same testimony we would find different facts. We are certainly not here to say that even if we agree with the conclusions reached by the arbitrator that the penalty which — I mean which the arbitrator imposed is not

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something that a judge or some other judge would have done.

In this case it remains clear that the contract as understood to be interpreted in part provided as the arbitrator found and as he had a right to find as from the terms and conditions of the agreement that insubordination could be the grounds for an automatic termination. The arbitrator found insubordination in this instance. The arbitrator found that there was a history which justified a discharge action taken by the employer for insubordination, and the arbitrator found as well that the action of automatic termination was justified under the contractual documents and under the facts presented to the arbitrator.

I have a very limited role under such circumstances. I cannot exceed that role. I think I have set forth all of the reasons why the award must be confirmed and for that reason--for those reasons, the order to show cause is not granted to the plaintiff. The motion of the defendant to confirm the award must be granted. Thank you very much.

Counsel for the defendant would submit the appropriate order.

MR. MAYER: We have submitted an order, Your Honor.

THE COURT: I haven't looked at it yet. It's okay.

MR. MAYER: If not I will draft something else.

THE COURT: All right. I have to add one thing to that finding. I don't believe I stated. I am not sure if I did, but I don't believe I stated that the arbitrator expressly found no evidence of discrimination either racial or ethnic or evidence that

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they were selective enforcement because of union activities on the part of the employee plaintiff.

(Whereupon the decision is rendered.)

* * * * *

CERTIFICATE

I, DONNA RINALDI, a Certified Shorthand Reporter of the State of New Jersey, do hereby certify that the foregoing transcript is an accurate and true representation of the proceeding as taken stenographically by and before me to the best of my ability and knowledge.

s/ Donna L. Rinaldi
DONNA L. RINALDI
CERTIFIED SHORTHAND REPORTER
LICENSE NO. 01310

**APPENDIX J — OPINION AND AWARD IN AMERICAN
ARBITRATION ASSOCIATION CASE NO. 18 30 059285N (R.
JALIL) BY ARBITRATOR JOHN M. STOCHAJ, DATED
MAY 12, 1986**

AMERICAN ARBITRATION ASSOCIATION
18 30 0592 85N (R. JALIL)

In the matter of arbitration between:

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS
OF AMERICA, LOCAL 417

and

AVDEL CORPORATION

OPINION AND AWARD

On March 3, 1986 the above-named parties entered into an agreement submitting the following controversy for determination by the undersigned duly designated as Arbitrator under the Rules and Regulations of the American Arbitration Association:

**WHETHER OR NOT RICARDO JALIL WAS DISCHARGED
FOR CAUSE? IF NOT, WHAT SHALL BE THE REMEDY?**

The parties elected to provide post hearing briefs which were received on or about April 12, 1986.

The following appearances were noted at the Hearing:

for the Union. . . .

Gerald Beck, Sr.

Robin Alexander, Assoc. Counsel, UE

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John H. Hovis, UE Director of Organization
Ricardo Jalil
Michell H. Miller, UE Field Organizer
Robert Weinmann
Donald J. Williams, Chief Steward

for the Company. . . .

Joe Butrynowicz - Plant Foreman
Peggy Noona - Personnel Dir.
Steve Getten - Plant Manager
Steve Mayer - Co. Attorney

POSITION OF THE COMPANY

The first to testify on behalf of the Company was Mr. Adolf Nier, the grievant's immediate supervisor. (This testimony (direct and cross) was taken by phone for the witness was in the hospital.) He stated that he saw Ricardo Jalil, the grievant, on October 28, 1985 with a walkman radio. Mr. Nier then said that he instructed the grievant to remove the radio. When the grievant did not respond after two attempts, he stated that he talked with Shop Steward Kelley and once again observed the grievant with the radio. At this point Nier stated that he spoke with the Plant Foreman and that the Plant Foreman instructed Mr. Jalil to remove the radio. Nier stated that the grievant then removed the radio.

Mr. Nier then testified concerning his observation of the grievant on October 30, 1985 again with the radio. Once again he stated that he told the grievant to remove the radio and when the grievant did not follow the instruction, he went to the Plant Manager, Mr. Getten.

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Mr. Nier then testified that he was instructed by the Plant Manager to secure Mr. Butrymowicz as witness and to once again instruct the grievant to remove the radio. The grievant still did not comply and the two supervisors (Nier & Butrymowicz) reported to Mr. Getten the failure of the grievant to remove the radio.

Following a conversation with the Shop Steward, Mr. Nier testified that both he and Mr. Getten again confronted the grievant and were ultimately told by the grievant to "get the hell away from here".

Mr. Getten than called a meeting with the Union and informed those present of the grievant's actions and that disciplinary action would take place.

The next to testify was Mr. Joe Butrymowicz, Plant Foreman. He testified that on Octobert 28th Mr. Thurchak, a supervisory employee, told him that the grievant was wearing a walkman radio. He then indicated that Mr. Thurchak called the grievant over and told him to remove the radio because it was a safety hazard. Mr. Thurchak reported that the grievant replied that it was ok because he had his ear plugs in place.

Mr. Butrymowicz then testified that on October 30 Mr. Nier informed him and Mr. Getten, Plant Manager, that the grievant was wearing the radio again. He then stated that Mr. Getten instructed both Nier and Butrymowicz himself to tell Mr. Jalil to remove the radio. He stated that Mr. Nier so instructed the grievant several times and then warned the grievant about insubordination. He stated that the grievant informed them that the radio was not on.

The third witness, Mr. Stephen Getten, Plant Manager, first

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testified concerning a warning given to the grievant to improve productivity in his department. Mr. Getten stated that the grievant became lead man in December 1984 and soon after production had gone down.

Mr. Stephen Getten, Plant Manager, then related his role in these incidents. On October 30th he had been informed by Mr. Nier that the grievant was wearing a walkman and refused to remove it. In addition, he stated that he was informed about the same kind of problem on October 28th.

He then stated that he sent both Nier and Butrymowicz to instruct the grievant to remove the radio. When this failed Mr. Getten stated that he asked the Shop Steward to help out in the matter and this request was refused.

Mr. Getten then testified that he and Nier went out into the plant and called the grievant out into the aisle. Mr. Getten then instructed the grievant to remove the radio, warned the grievant about possible discipline and stated that the grievant was in violation of safety rules. He then stated that the grievant became loud and told both management personnel to "get the hell out of here".

Mr. Getten then told the Shop Steward to come to a meeting. At this meeting, Mr. Jalil, Williams and Kelley, Union Representatives, were present along with Mr. Getten, Mr. Nier, and P. Noona, Personnel Director. Mr. Getten then stated that he informed those at the meeting that the grievant would be disciplined for insubordination and violation of safety rules.

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POSITION OF THE UNION

Mr. Gerald Beck of the Union Safety Committee testified that the Company came forward with written safety rules after the grievant, Ricardo Jalil, had requested an inspection by OSHA.

He also noted that in the written safety policies of the Company there was no mention of walkman radios. He further testified that other people had radios in the plant and were not disciplined or in any manner told not to play these radios. He then stated that the radios were found in the Shipping and Receiving and Maintenance Departments. However, he added four other people did wear head sets at one time or another.

In referring to the safety policies, he further stated that there is a procedure and that employees have been warned, written up and suspended but no one was ever terminated.

Mr. Beck then testified that some two years ago an accident occurred wherein a fork lift driver ran into a sweeper and no action was taken by the Employer.

Finally he stated that all safety devices mandated by the policies applied equally to all employees no matter their rank in the Company.

Mr. Don Williams, Shop Steward and Recording Secretary of the Union, testified that radios were present in the Shipping and Receiving and Maintenance Departments. He noted that Safety was treated in a serious manner where the Company and Union discussed any incident which might have taken place.

He now told of the meeting in Mr. Getten's office. Herein

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he related the radio problem and the initial refusal of the grievant to remove the radio. He then stated that Kelley, a Shop Steward, told the grievant to remove it and take it to the locker. This, he noted, the grievant did do.

Mr. Williams then testified to another meeting wherein a grievant was terminated.

Mr. Williams then testified that the grievant, Mr. Jalil, defended the employees while Kelley found the employees wrong and the management right.

Mr. Ricardo Jalil then testified. He first noted that he was a lead man for about a year. He stated that he became active in the Union in 1979 and elected Shop Steward in 1980-81.

He then stated that prior to his active Union work, he had no problems with the Company. He reported, however, that after he contacted OSHA his problems began. He first stated that the Foreman Nier took away his job and second that in terms of pay progression prior to 1979 it was fine but after 1979 the company held down his pay.

Concerning October 28th, he stated that he arrived at approximately 6:30 a.m. and met Supervisor Mike and both had joked together. He worked all day without any problems. He stated that he was out on Union business on the 29th.

On Octobert 30th he testified that he started up the machines and then put on the radio. About 8:00 a.m. he stated that the Shop Steward checked to see if he had his ear plugs in and the Shop Steward walked away.

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He further stated that about 10:00 a.m. the Foreman came to him and ordered him to remove the radio. He said that he asked why and that others had radios. The testimony then shows that the Foreman left and returned with another Supervisor and once again he was told to remove the radio.

He then stated that he turned off the radio and that he had no representation. Next he stated the Mr. Getten came in and stated he was to take off the radio. He then noted that he moved out of the department because the supervisor had no safety equipment.

He then noted that he saw the shop steward and informed him of what had happened, put the radio in his locker and thought the matter all over. However, he then stated that he was called to a meeting and informed that he was terminated and then was escorted out of the plant.

John Hovis, UE National Director of Organization, then testified that he serviced this local and that the grievant was a better union man than Kelley. He further stated that Mr. Getten had told him that the grievant was more difficult to deal with than Kelley and that he could deal with Kelley.

He then related his part of the story of October 30th. On this day he received a call from Mr. Kelley concerning the grievant and the walkman radio. Shortly after, he received another call concerning the termination of Mr. Jalil. During that call Mr. Kelley also told him that the people walked out in protest. He then related that he went over and, along with Jalil, persuaded the people to return to work.

He then stated that he questioned Getten about the

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termination and was informed that Mr. Jalil was terminated for a safety rule violation and insubordination.

DISCUSSION

To put the positions of the parties briefly: The Company contends the grievant violated a safety rule and that he was insubordinate on several occasions. The Union contends that the grievant did not violate any safety rule concerning radios for none exists and that he was not insubordinate. In fact, the Union contends that the grievant is being fired for his active role as Union representative.

A review of the grievant's own testimony shows that at least on October 30, 1985 when he was first told by the Foreman to remove the walkman he responded by saying . . . why, I'm doing my job and others have radios. He then stated that the Foreman returned with another Supervisor and once again he was told to remove the walkman. He testified that again he responded that . . . I'm doing my job, others have radios. He then testified that he turned off the radio. Herein there are at least two occasions where the grievant admitted that he failed to obey a legitimate order.

All parties to this dispute are fully aware that the failure to obey a legitimate order constitutes insubordination. Insubordination is one of those heinous offenses which calls for termination.

The Union asserted that the reason for the termination was that the grievant was an active shop steward and was now the President of the Local representing two plants. However, an experienced Union representative, no matter how militant, knows

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that the rule is to obey and grieve later. As a Union President he knows that in order to properly implement a collective bargaining agreement workers cannot simply rely on their own judgment to decide if something is proper or not but are to use the dispute settlement procedure provided for in the contract. To do otherwise would result in chaos for both the Union and the Company.

A further investigation of the charge . . . namely that the grievant's union activity precipitated the discharge, compels this Arbitrator to note that the OSHA incident happened in 1981 and here we are in the latter part of 1985. Furthermore, the Company had made the grievant a lead man after he began his activity with the Union. Why would a company reward an employee who supposedly was so active with the Union especially to a position of leadership within the workforce and not to an "up and out" position?

There was an allegation that the Supervisor tried to take away the grievant's job, but no evidence was offered as to what Supervisor, what job and under what circumstances. The Union also noted that the pay progression was held back but again no evidence was offered to identify which pay increases during which period of time. Finally, the Union argued that the termination is tied to charges made by the grievant with the EEOC. Herein nothing was offered to tie the charges made with the termination except the fact that the charges arrived at the Company on October 28th. Nothing is on the record concerning the charge(s) except the date of their arrival at the Company.

In view of the above, the Arbitrator is just not convinced that the employee was terminated because of his union activity. However, the Arbitrator remains mindful of the admission of

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the grievant that he twice disobeyed a legitimate order. This leads the Arbitrator to believe that the grievant reacted similarly on October 28th when he was instructed to remove the walkman on at least one occasion. As noted before, insubordination is a serious offense and since insubordination had been found the Arbitrator has no alternative but to sustain the termination.

AWARD

**GRIEVANCE DENIED. THE TERMINATION OF
RICARDO JALIL WAS FOR CAUSE.**

s/ John M. Stochaj
JOHN M. STOCHAJ
ARBITRATOR

MAY 12, 1985

Sworn and subscribed before me
this 13th day of May, 1986.

s/ Rosemarie R. Stochaj
NOTARY PUBLIC OF NEW JERSEY
My Commission expires 12/7/86

APPENDIX K — GRIEVANCE

LOCAL 417, UNITED ELECTRICAL RADIO & MACHINE
WORKERS OF AMERICA (UE)

18 CHURCH STREET

PATERSON, NJ 07505

GRIEVANCE

Complainant: Ricardo Jalil

Shift: Day

Name of Company: Avdel

Department: Leadperson

Company Service: 8 years

Job Service: 1 year

Nature of Grievance: *Grievance Date:* October 31, 1985

Complainant was fired because he filed a discrimination charge with New Jersey Division of Civil Rights (EEOC), on which copy was received by the Company (Avdel) on October 28, 1985. Complainant was discharged on October 30, 1985, under Company's false accusation of insubordination. Complainant have been retaliated against in violation of the Civil Rights Act of 1964, as amended for having filed a charge against the employer.

s/ Ricardo Jalil
Complainant

s/ J. Kelley
Chief Steward

Company's Answer:

FOREMAN or DEPARTMENT HEAD

Mr. Jalil was terminated for gross insubordination over a two-day period.

76a

Appendix K

s/ S. Getten
11/4/85
Foreman or Department
Head's Signature



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(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AVDEL CORPORATION,

Petitioner.

v.

RICARDO JALIL,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

RESPONDENT'S BRIEF IN OPPOSITION

DOUGLAS S. EAKELEY*
DAVID W. GARLAND
RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Counsel for Respondent

* *Counsel of Record*

QUESTION PRESENTED

Is there a conflict in the Circuits concerning the preclusive effect of an arbitration award confirmed by a state court where the state court did not consider the merits of the claimant's Title VII claim?

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Respondent Ricardo Jalil respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is reported at 873 F.2d 701 (1989).

STATUTES INVOLVED

In addition to the statutory provisions cited by petitioner, the following statute is relevant to the question presented:

N.J.S.A. 2A:24-8. Vacation of [arbitration] award; rehearing

The court shall vacate the award in any of the following cases:

- a. Where the award was procured by corruption, fraud or undue means;
- b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
- c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
- d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

When an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

COUNTERSTATEMENT OF THE CASE

On October 30, 1989, respondent Ricardo Jalil was terminated as an employee of petitioner Avdel Corporation ("Avdel") because of "gross insubordination" stemming from Mr. Jalil's use of a "walkman" radio allegedly in violation of company rules. Mr. Jalil, who was president of the United Electrical Radio Machine Workers of America, Local 417 (the "Union"), claimed that he was terminated wrongfully and filed a grievance pursuant to the terms of a collective bargaining agreement between Avdel and the Union.

Mr. Jalil alleged in his grievance that he was discharged in retaliation for having filed a Charge of Discrimination against Avdel with the New Jersey Division of Civil Rights and the Equal Employment Opportunity Commission ("EEOC") on October 17, 1985, which was received by Avdel on October 28, 1985, only two days before he was terminated.¹ Mr. Jalil stated that he had "been retaliated against in violation of the Civil Rights Act of 1964, as amended for having filed a charge against the employer." (75a).

During arbitration proceedings which followed, Avdel contended that Mr. Jalil had violated a company safety rule and had been insubordinate. The Union, on behalf of Mr. Jalil, argued that Mr. Jalil "did not violate any safety rule concerning radios for none exist[ed] and that he was not insubordinate." (72a). In fact, the Union contended that Mr. Jalil was "fired for his active role as Union representative." (72a).

Following a hearing, the arbitrator concluded that Mr. Jalil had been insubordinate for failing to obey an order to remove the radio. Although observing that the Union had also argued that Mr. Jalil's "termination [was] tied to charges made by the grievant with the EEOC," the arbitrator passed over that contention and concluded that he was "not convinced that the

¹ Mr. Jalil also claimed in the October 17, 1985 Charge of Discrimination that he had been improperly suspended by Avdel in September 1985, that the reason for the suspension was his national origin, and that his repeated requests to review his personnel file had been denied.

employee was terminated because of his union activity." (73a). The arbitrator did not consider at all whether Mr. Jalil's firing may have been discriminatory notwithstanding his finding of insubordination.²

Mr. Jalil sought to vacate the arbitrator's award in the Superior Court of New Jersey on the grounds that the award was in violation of the arbitrator's statutory powers, and, alternatively, that the arbitration award was procured by undue means. (62a). Avdel cross-moved to confirm the award.

The New Jersey court expressly declined to review the merits of the arbitrator's decision, recognizing that, pursuant to N.J.S.A. 2A:24-8, it has "a very limited role" in reviewing arbitration awards. (63a). Accordingly, the New Jersey court observed:

We are not second judges of what the arbitrator did. To put it in simpler terms we are not second guessers of what the arbitrator did. We are not here to say that given the same set of facts, we would come to different conclusions or given the same testimony we would find different facts. We are certainly not here to say that even if we agree with the conclusions reached by the arbitrator that the penalty which — I mean which the arbitrator imposed is not something that a judge or some other judge would have done.

(62a-63a). The New Jersey court thus confirmed the award because it "found no evidence that the arbitrator's award was procured by undue means or that the powers of the arbitrator were exceeded." (62a).

Following the New Jersey court's confirmation of the arbitrator's award in favor of Avdel, Mr. Jalil proceeded *pro se* by filing a complaint in the United States District Court for the District of New Jersey. Mr. Jalil alleged that Avdel terminated his employment because of his national origin and in retaliation

² In its Petition, Avdel mischaracterizes the arbitrator's decision when claiming that "[t]he arbitrator specifically addressed and rejected Jalil's discrimination and retaliation claims." (Petition at 8).

for his filing of a discrimination charge with the EEOC, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* Mr. Jalil also sought to vacate the decision of the arbitrator and to reverse the New Jersey court's confirmation of the award. After the Honorable Dickinson R. Debevoise, U.S.D.J., granted Avdel's motion for summary judgment, *Jalil v. Avdel Corp.*, No. 86-4878 (D.N.J. Aug. 3, 1987), Mr. Jalil, again proceeding *pro se*, filed a second Title VII claim in the United States District Court. (43a). The Honorable Harold A. Ackerman, U.S.D.J., granted Avdel's motion for summary judgment in the second action as well. *Jalil v. Avdel Corp.*, No. 87-4457 (D.N.J. March 1, 1988). (34a).

Mr. Jalil appealed both decisions to the United States Court of Appeals for the Third Circuit, which consolidated them and appointed the undersigned counsel to represent Mr. Jalil. On appeal, Mr. Jalil argued that the evidence before Judge Debevoise established a *prima facie* case of retaliatory and national origin discrimination.

Avdel opposed the appeal principally on the ground that Judge Debevoise had correctly concluded that Mr. Jalil had failed to establish a *prima facie* claim because his insubordination made him unqualified to continue employment. Secondarily, relying on this Court's opinion in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), Avdel argued that the arbitrator's award should be given great deference and that it supported a grant of summary judgment by the district court.

In an opinion filed on February 1, 1989, the Court of Appeals affirmed the summary judgment as to Mr. Jalil's national origin claim, but reversed the summary judgment as to the retaliatory discrimination claim because "the evidence created a factual issue regarding [Avdel's] motivation that properly belongs to the factfinder." (32a). As for Avdel's argument that the arbitrator's award, as confirmed by the New Jersey court, justified summary judgment, the Court wrote:

Although an arbitral determination may be accorded great weight if it gives full consideration to an

employee's Title VII rights, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 & n.21 (1974), it cannot, in itself, be dispositive of a Title VII claim because the Civil Rights Act of 1964 vests final responsibility for the enforcement of Title VII in the federal courts.

(32a-33a). On the facts before it, the Court of Appeals concluded that the arbitrator's award was "not due the great weight necessary to achieve summary judgment for [Avdel]." (33a).

On a motion for leave to file a petition for rehearing before the court *en banc*, Avdel argued that the Court of Appeals' opinion was contrary to its decision in *Rider v. Commonwealth of Pennsylvania*, 850 F.2d 982 (3d Cir.), *cert. denied*, U.S. , 109 S. Ct. 556 (1988), and the Ninth Circuit's opinion in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, U.S. , 110 S.Ct. 69 (1989), where federal courts had given preclusive effect to state court decisions confirming arbitration awards after reviewing the Title VII claims in issue on their merits. The Court of Appeals subsequently granted the petition for a rehearing and vacated its earlier opinion. (21a). In an opinion filed on May 4, 1989, the Court distinguished *Rider* on the grounds that the New Jersey court had not given consideration to Mr. Jalil's Title VII rights and again reversed the summary judgment as to Mr. Jalil's retaliatory discrimination claim:

In Jalil's case, the arbitrator made passing reference to plaintiff's Title VII claims, although from our reading it appears to us that he did not adequately consider the retaliatory discharge claim or the question whether a firing may be discriminatory notwithstanding the employee's insubordination. In contrast to *Rider*, however, the state court here gave no consideration to plaintiff's Title VII rights, explicitly refusing to stand as "second guessers of what the arbitrator did." Thus, here, unlike *Rider*, the state court reviewing the arbitrator's decision did not address the same issues raised in Jalil's Title VII action.

Jalil v. Avdel Corp., 873 F.2d 701, 706 (3d Cir. 1989) (citations and footnotes omitted).

REASON WHY THE PETITION SHOULD BE DENIED

There Is No Conflict In The Circuits Concerning The Preclusive Effect Of An Arbitration Award Confirmed By A State Court Where The State Court Did Not Consider The Merits Of The Claimant's Title VII Claim.

Avdel contends that its petition should be granted because the Court of Appeal's decision conflicts with the decision of the Ninth Circuit in *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, U.S. , 110 S.Ct. 69 (1989). (Petition at 8). Avdel misapprehends *Caldeira*, however. There, the Title VII plaintiff, as in *Rider v. Commonwealth of Pennsylvania, supra*, had a "full and fair opportunity" to have his discrimination claim reviewed on the merits before a state court.

That court "was presented with more than the collective bargaining agreement and the award before rendering its confirmation order." 866 F.2d at 1180 n.3. The plaintiff "squarely attacked the merits of the arbitrator's decision." *Id.* Thus, "[t]he state court circuit, in confirming the arbitrator's award, necessarily determined that proper cause existed for Caldeira's discharge due to insubordination." *Id.* at 1179. .

Similarly, in *Rider*, which Avdel unsuccessfully sought to portray in the court below as conflicting with its decision in this case, the state court decided the issue of discrimination on the merits. On review, the Third Circuit observed:

[A]s we read the Commonwealth Court's opinion, its judgment was derived, in large part, from an independent analysis of the [discrimination] question.

Rider, supra , 850 F.2d at 992-93. The Court concluded that

whatever else the Commonwealth Court may have considered in the instant case, it clearly considered

and disposed of the merits that gave rise to this dispute

Id. at 993.

Unlike the plaintiffs in *Caldeira* and *Rider*, Mr. Jalil had no such opportunity for judicial review of his discrimination claim on the merits, because the New Jersey court followed a narrow statutory scope of review in considering whether to vacate the arbitrator's award. As the Third Circuit concluded:

A review of the New Jersey court's opinion confirming the arbitrator's decision reveals that the issues there are not identical to the issues in Jalil's Title VII action in federal court Because the issues in the two actions differ, the state court's affirmance of the arbitrator's decision cannot have preclusive effect in the Title VII action before us.

It is this difference in issues that distinguishes this case from *Rider*

Jalil v. Avdel Corp., *supra*, 873 F.2d at 705.

Finally, it should be noted that the opinion of the Court of Appeals is consistent with *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985), which the Ninth Circuit recognized in *Caldeira* presented a materially different set of circumstances from those present in either *Caldeira* or *Rider*. *Caldeira*, *supra*, 866 F.2d at 1179-80. In *Bottini*, like *Jalil*, the state court's review of the arbitration award was narrowly limited, and the state court lacked the power to address the merits of the plaintiff's Title VII claim. *Bottini*, *supra*, 764 F.2d at 120-21.

In sum, Avdel seeks to create a conflict where none exists among the circuits. The Second, Third, and Ninth Circuits are in agreement that where a state court has not considered the merits of a discrimination claim in reviewing an arbitrator's award, the plaintiff has the right to have his Title VII claim heard by a federal court, and preclusive effect should not be given to the state court's judgment.

CONCLUSION

For this reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DOUGLAS S. EAKELEY

RIKER, DANZIG, SCHERER & HYLAND
Headquarters Plaza
One Speedwell Avenue
Morristown, New Jersey 07962-1981
(201) 538-0800

Counsel for Respondent

On the brief:

DAVID W. GARLAND

Dated: December 1, 1989